United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2229. 785

FRED C. FISHER, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, AND FRED DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 26, 1910.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1910.

In the Court of Appeals of the District of Columbia.

No. 2229.

FRED C. FISHER, Appellant,
vs.
RICHARD A. BALLINGER, Sec'y, &c., et al.

a Supreme Court of the District of Columbia.

Equity. No. 28637.

FRED C. FISHER, Complainant,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRED DENNETT, Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill for Injunction.*

Filed Jun- 28, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28637.

FRED C. FISHER, Complainant,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRED DENNETT, Commissioner of the General Land Office, Defendants.

Comes now the complainant in the above entitled cause and complains against the defendants and for cause of action states;

I. That he is of lawful age, a citizen of the United States, a resident of the State of Wyoming and brings this action in his own right.

II. That the defendant, Richard A. Ballinger, is of lawful age, a citizen of the United States and Secretary of the Interior. That the defendant, Fred Dennett, is of lawful age, a citizen of the United States, and Commissioner of the General Land Office; That the defendants are sued herein in their official capacities as Secretary of the Interior and Commissioner of the General Land Office,
2 respectively.

That on the 20th day of July, 1905, one E. May Inkster, a citizen of the United States, filed in the local land office at Evanston, Wyoming, her application to make desert land entry to the S. W. ¼, N. E. ¼, W. ½, S. E. ¼, S. W. ¼, Sec. 2; and N. E. ¼, S. E. ¼, Sec. 3, Township 34 North, Range 110 West, 6 P. M., Evanston, Wyoming, land district, which said application was lawful and regular in form and was accepted by the officers of said local land office and regularly entered upon their books as desert land entry No. 1481; that she paid the filing fees and other charges as required by law and that she gave notice to the world by publication, as required by law, that on a day certain and therein designated, she would offer final proof before the local land officers of her compliance with the law; that on the day named in said notice as published she appeared before the local land officers and submitted final proof showing that *he* had expended the sum of $960 in improving and irrigating said land and had complied with all the requirements of the law; that the local officers considered her proof and found and so advised her that upon the payment of the purchase price prescribed by law she was entitled to a patent; that thereafter and on to wit, the 7th of October, 1905, she paid to the Receiver of said land office the sum of $320, having theretofore paid to said office the sum of $80.00 making a total of $400, the full amount of the purchase price as required by law and received from said Receiver a receiver's receipt or final certificate, certifying that she had complied with all the requirements of the law
3 and had paid the purchase price for the land and was entitled to a patent from the Government of the United States.

*L*V. That thereafter, and on to-wit, December 23, 1905, the entry-woman, E. May Inkster, for valuable consideration, conveyed the said lands to this complainant, by good and sufficient warranty deed of conveyance.

V. *a*. That on May 7th, 1906, one William J. Alexander filed in the said local land office at Evanston, Wyo., an affidavit of contest against the entry of E. May Inkster of the above described land, alleging as grounds therefor that the said land hereinabove described, was not at the time said entry was made by the said E. May Inkster, desert land, but had been theretofore reclaimed by one James Westfall; that the said E. May Inkster had done nothing to reclaim the said land, had not constructed any ditches or in any way improved the same; and that the said Inkster entry was therefore void; that the affiant, William J. Alexander, desired to enter a part of the land as a homestead and requested that he be permitted to establish said allegations by competent proof at such times and place as might be named by the Register and Receiver for hearing

on said contest; that upon said allegations being proven that the entry of the said Inkster be declared canceled and forfeited to the United States, and that he be permitted to enter a part of the said land as a homestead by paying the expenses of said hearing; that said affidavit of contest was transmitted to the Commission- of the General Land Office and by him considered and an order issued directing the local officers to permit the said Alexander to
4 prosecute said contest; that said contest was prosecuted before the local officers upon the questions raised in the contest affidavit, namely, whether said land at the time the said E. May Inkster entered same was improved and irrigated and had been reclaimed and was therefore not subject to entry at the time she was permitted to enter same; and further that the said Inkster had not improved said land as the statute required, subsequent to said entry and before the submission of final proof; that the Register and Receiver, who personally heard the evidence jointly rendered a decision, under date of July 8, 1907, reading in part as follows:

"Having fully considered all the evidence in the case and the manner and interest of the different witnesses testifying and the credibility of their testimony, and believing that there has not been any fraud committed by the claimant or her successor in interest, and that every possible effort has been made by them to properly comply with the law, the said entry in controversy is sustained, and it is recommended that it be passed to patent."

b. That thereafter an appeal was taken from said decision of the local officers, to the Commissioner of the General Land Office, who upon the record based upon the aforesaid affidavit of contest, rendered a decision on December 12, 1907, reversing the finding of the local officers and holding the entry of E. May Inkster for cancellation upon the ground among others that the said E. May Inkster had colluded and conspired with complainant and his wife, C. Helen Fisher, to obtain title to said land, for the purpose of conveying title thereto, when obtained to complainant or his wife.

c. That thereafter an appeal was taken to the Secretary
5 of the Interior, one of the assignments of error upon which said appeal was based being that neither the affidavit of contest or any other paper filed by the contestant or any other person as a ground for said contest apprised either complainant or E. May Inkster that said entry was being contested on the ground that complainant or his wife had conspired with the said E. May Inkster to obtain title to said land by having the said Inkster enter same, make the requisite and necessary improvements thereon to enable her to make final proof and then convey title to said land to complainant or his wife; that said Secretary rendered an opinion therein under date of April 25, 1908, affirming the said decision appealed from of the Commissioner of the General Land Office.

d. That thereafter a motion for review of the said decision of the Secretary, rendered under date April 25, 1908, was filed with the said Secretary, and among the said grounds assigned for reconsideration of said decision was that neither the affidavit of contest nor any other paper filed in the case prior to, or during the hearing of said cause

by the local officers, advised or apprised complainant or the said E. May Inkster that said contest was being prosecuted upon any allegation of collusion or conspiracy to obtain title to said lands for the purpose of enabling the said E. May Inkster to acquire title thereto, and convey said land to complainant or his wife, C. Helen Fisher; that the said Secretary rendered a decision under date June 3rd, 1908, denying said motion and reading in part as follows:

"That is the view the Department took of the case and it is
6 immaterial whether it was charged in the contest or not,"

referring to said specification of error.

VI. That thereafter on June 12, 1908 a motion was filed for a review of said decision of June 3rd, 1908, setting up that it was error to hold the entry of E. May Inkster "for cancellation on the ground that there was collusion and conspiracy between contestee and Fred C. Fisher, or his wife C. Helen Fisher, as neither affidavit of contest nor any other paper, filed in this proceeding, nor any question asked during the trial of the cause before the local officers, advised or apprised contestee that this was one of the grounds upon which said contest was being prosecuted," and asking that the case be remanded to the local officers for a hearing upon "the question as to the bona fides of the entry and the alleged collusion and conspiracy upon which the decision complained of is based." This motion was supported by the affidavits of complainant, his wife and others setting forth that they had no knowledge at any time prior to or during the hearing on the contest of any allegation of collusion or conspiracy with the entrywoman E. May Inkster to have her enter the land and secure patent for their benefit. On March 25, 1909 the Secretary denied said motion and thereby denied complainant an opportunity to be heard in defense of his valuable property rights in said land.

VII. That the Commissioner of the General Land Office in accordance with the said decision of the Secretary rendered under date of March 25, 1909 has issued orders to the Register and Receiver of the Evanston, Wyo., land office directing them to cancel the
7 entry of E. May Inkster; that immediately upon the cancellation of said entry, the land in controversy will be restored to the unappropriated public domain and will be subject to homestead entry; that complainant will then be left remediless in the courts as he cannot maintain a suit for the recovery of the property while the legal title remains in the Government of the United States but can only do so after the land has been entered by an individual and patent issued, which would require several years' time, and that unless restrained by order of this court from cancelling said entry said Secretary will arbitrarily and without affording complainant an opportunity to be heard in defense of his title to said property, cancel and set aside said entry on a question upon which neither complainant nor his assignor the entrywoman, E. May Inkster, have ever had an opportunity to be heard contrary to law, and to the great, lasting and irreparable injury of complainant.

VIII. That the entry made by E. May Inkster was made after consulting the Receiver of the Evanston Land Office, who advised her

that she could lawfully enter the said land; that after said entry was made the said E. May Inkster, or her agents or representatives, expended for her far more than the amount required by law in improving and rendering profitable and susceptible of cultivation said land; that the question of the expenditures having been made by C. Helen Fisher or complainant, as her agent or representative, was never raised before the local land office; that as the contest affidavit
8 did not allege or even intimate conspiracy or connivance between the complainant or his wife, C. Helen Fisher and the entrywoman, E. May Inkster, and as no questions were asked during the hearing of said cause by any person that intimated to them that this was one of the grounds upon which the contest was instituted or was being prosecuted that no evidence was introduced establishing the fact that any expenditures made by C. Helen Fisher or complainant were made for her exclusive use and by them as her agents or representatives, which they could have so done had they been apprised of the fact that this was the ground upon which said contest was to be decided.

IX. That complainant, after he had purchased said land from the entrywoman, E. May Inkster, and before contest was instituted, expended large sums of money in improving said land and in placing valuable permanent and lasting improvements thereon, and that respondents have no lawful authority to arbitrarily attempt to destroy his title to said land without giving him an opportunity to be heard upon the precise questions upon which any order may be based holding the entry of the said E. May Inkster for cancellation, but that unless restrained by order of this court said respondents will arbitrarily and without authority of law cancel said entry.

Wherefore complainant prays:

a. That copy — subpœna and all proper process issue making Richard A. Ballinger, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office, in their official capacity as such Secretary and Commissioner, respectively parties defendant
9 and requiring them to appear on a day certain and answer fully the exigencies of this complaint.

b. That upon a preliminary hearing an order issue out of this court enjoining and restraining the respondents, their officers, agents or employés from cancelling said entry until complainant and E. May Inkster have been served with notice of the exact charges made against said entry and intended to be prosecuted by some person, or officer or agent of the Department of the Interior, and until such charges have been found to be true at a hearing had in the regular and ordinary course of proceedings before said Department; that upon final hearing of this cause said injunction be made perpetual.

c. That complainant be given judgment for all costs herein expended.

d. That complainant may be given such other and further relief as to this court may seem just and proper.

WEBSTER BALLINGER,
Solicitor for Complainant.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Nellie I. Middlekauff, a Notary Public in and for the District aforesaid, Webster Ballinger, to me well known, who, upon his oath, deposes and says, that he is the duly authorized attorney for the above named complainant; that complainant is a non-resident of the aforesaid District; is not in the
10 District of Columbia and that it is not possible to have him personally verify the above petition in time to stay the cancellation of the entry in question; that as attorney for said complainant he has personally examined the Governmental records and that the matters and things therein stated of his own knowledge are true as shown by said records, and that those things stated upon information and belief he believes to be true.

WEBSTER BALLINGER.

Subscribed and sworn to before me this 28th day of —, 1907.

[SEAL.] NELLIE I. MIDDLEKAUFF,
Notary Public, D. C.

My commission expires Oct. 12, 1911.

Defendants' Answer.

Filed Sep. 3, 1909.

In the Supreme Court of the District of Columbia.

* * * * * * *

The Joint and Several Answer of Frank Pierce, First Assistant Secretary of the Interior, and in Pursuance of Law Acting as Secretary Thereof in the Absence of Richard A. Ballinger, Secretary, and of Fred Dennett, Commissioner of the General Land Office, to the Bill of Complaint of Fred C. Fisher.

These defendants, and at all times hereafter saving and
11 reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto, or to so much or such parts of said bill as these defendants are advised is material, say:

1–2. They admit the averments of the first and second paragraphs.

3. They admit, as alleged in the third paragraph of said bill, that said E. May Inkster filed application, regular in form, to make desert land entry for the land therein described; that said application was accepted and entered as averred; that the filing fees and charges were paid and notice given as alleged; and that she offered final proof and final certificate was issued. But they allege that said application contained, at the time of the filing thereof, as she, the said E. May Inkster then and there well knew, certain material

declarations, statements and matters which were false and untrue in this, to-wit, that she, the said E. May Inkster, did therein falsely state and declare that said tract of land was desert in character, and that she, the said E. May Inkster intended to reclaim the same by conducting water thereon; that said land was at the time of making said application, dry and arid, that no portion thereof had been reclaimed by conducting water thereon, and that said declaration was not made for the purpose of fraudulently requiring title thereto, but for the purpose of faithfully reclaiming the same by conducting water thereon, when in truth and in fact, as she, the said E. May Inkster, then and there well knew she did not intend to reclaim said land by having water conducted thereon or otherwise; that said land was not dry and arid, but, on the con-
12 trary, had been theretofore, and was at said time, reclaimed by having water conducted and crops produced thereon; and also, as she. the said E. May Inkster, also then and there well knew, said declaration was made for the purpose of fraudulently obtaining from the United States title thereto. as will be hereinafter more particularly set forth; and aver that the matters stated and set forth in making final proof were not true, among other things in this to-wit, that she, the said E. May Inkster, had not expended the sum of $960. or any other sum, in improving and irrigating said land as required by law, or otherwise. They also aver that the affidavits submitted in making final proof were all executed before the petitioner, Fred C. Fisher. then U. S. Commissioner. They are informed and believe and therefore aver that he, the said petitioner, at that time well knew that the said matters set forth in said application and final proof papers were not true, and that the m-king and presentation thereof was a fraud upon and against the United States.

4. They admit that thereafter she, the said E. May Inkster, conveyed said land to said petitioner, but are informed and believe, and, therefore, aver, that said conveyance was not for a valuable consideration, but, on the contrary, was purely voluntary and in pursuance of an understanding and agreement made previously to the filing of said application, for the purpose of fraudulently and unlawfully divesting the United States of the title to said land.

5. *a, b* & *c*. Answering the allegations of the fifth paragraph (*a, b* and *c*), they aver that the matters therein stated are more accurately and fully set forth in the following decisions, ad-
13 verted to in said paragraphs:

Decision of the General Land Office, dated December 12, 1907 copy of which is hereto attached, marked Exhibit A, and made a part hereof to the same extent as if here set forth in full; decision of the Secretary of the Interior, on appeal, dated April 25, 1908, copy of which is hereto attached. made a part hereof to the same extent as if herein set forth in full, and marked Exhibit B.

5. *d*. They admit the allegations in paragraph 5*d*.

And generally answering said paragraph 5, while admitting all matters therein alleged which are shown by said decisions to be true, and denying all other matters not so shown to be true, they say

and aver that the action of the General Land Office and of the Department of the Interior was based upon the evidence of said petitioner and his wife, C. Helen Fisher, given in a contest against said entry of said E. May Inkster, at which all parties in interest were present and had full opportunity to present evidence, to cross-examine witnesses, and to be heard; that in his supervisory capacity and control over all matters relating to the disposal of public lands the Secretary of the Interior has plenary power to dispose of any case, presented by appeal or otherwise, on evidence adduced after due process of law, on grounds formally alleged in contest proceedings or informally brought to his attention, and particularly that he had full power and authority to hear and dispose of the matters presented concerning said desert entry as aforesaid.

6. They admit the allegations in paragraph 6, but deny that petitioner was thereby or in any way denied an opportunity to
14 be heard in defense of his alleged property rights in said land, and aver, as aforesaid, that all and any action taken by the Department of the Interior and the General Land Office was based exclusively on evidence adduced at the hearing aforesaid, at which hearing petitioner was present in person and testified and at which the said E. May Inkster was represented by counsel.

7. In answer to paragraph 7, they say that orders for the cancellation of said entry were issued as alleged; that on June 24, 1909, and prior to filing of this petition, said entry was canceled; that thereby, as alleged, the land in controversy was restored to the public domain of the United States; that this bill in equity thereby constitutes in essence and effect a demand against the United States for a part of its said public domain; that the United States is a necessary party to this action but has not, in this behalf consented to be sued. And they deny that said cancellation of said entry was made without affording petitioner opportunity to be heard and aver that, on the contrary, E. May Inkster was represented by counsel at the hearing in the contest case and that petitioner and his wife, C. Helen Fisher, were present and testified fully.

8. They admit that E. May Inkster was advised by the Receiver of the Evanston Land Office that she might lawfully enter said land; they deny that subsequent to said entry money was spent by said E. May Inkster in improving or reclaiming the land and aver the fact to be that the land had already been reclaimed prior to said entry and by said petitioner or C. Helen Fisher; they admit that conspiracy was not formally alleged in the contest affidavit, and
15 aver that the fact that E. May Inkster did not enter said land in good faith and for her own use and benefit, but for the use and benefit of either petitioner or his wife, C. Helen Fisher was raised at said hearing and disclosed by the testimony of said petitioner and C. Helen Fisher. They aver that all expenditures in reclaiming the land were made by petitioner or by C. Helen Fisher, prior to the entry of said Inkster and while the land was claimed by C. Helen Fisher, and that said expenditures could not have been made and were not made for the "exclusive use" of said Inkster.

9. Answering the allegations of the 9th paragraph they say that

they have no information other than in said paragraph contained whether petitioner has expended a large sum or any sum in improving said land since his alleged purchase from E. May Inkster and therefore can not answer whether said averment is true or otherwise. They deny that they have arbitrarily or without authority of law destroyed or attempted to destroy petitioner's alleged title to said land without opportunity to be heard, and aver that in the proceedings before the Land Department and before this court, petitioner has been and is attempting fraudulently to procure the land in controversy in opposition to the laws of the United States governing the disposition of the public lands.

And further and more fully answering said petition, they are advised and therefore aver that petitioner is not entitled to the relief sought because he comes not into equity with clean hands, but as aforesaid has been and is seeking to secure public land of the
16 United States in a manner not authorized by law and in contravention of the laws of the United States, and in fraud of said United States.

And they further say, as they have been advised, that said petition shows lack of equity and lack of jurisdiction in this court to grant the injunction prayed for in this: (*a*) that the respondents are invested with full and exclusive jurisdiction over all questions of fact in the administration of the public land laws of the United States and that their findings as to the existence of collusion or conspiracy or of any other fact showing fraud or want of compliance with law, in the attempted acquirement of any part of the public domain, are not reviewable by the courts; and in this (*b*): that said entry having already been canceled as aforesaid, the injunction sought can not issue; and in this (*c*): that the land being now a part of the public domain of the United States, the latter is a necessary party to any suit or proceeding in law or in equity to put title to said land in issue, and that the United States has not in this behalf consented to be sued.

And now having fully answered, these defendants pray to be dismissed hence with their reasonable costs and charges in this behalf most wrongfully sustained.

FRANK PIERCE,
Acting Secretary of the Interior.
FRED DENNETT,
Commissioner of the General Land Office.

OSCAR LAWLER,
Assistant Attorney General,
Department of the Interior,
C. EDWARD WRIGHT,
Assistant Attorney,
Department of the Interior,
Solicitors.

17 DISTRICT OF COLUMBIA,
City of Washington, ss:

Frank Pierce, being first duly sworn, says that he is Acting Secretary of the Interior; that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRANK PIERCE.

Subscribed and sworn to this 3rd day of September, 1909, before me,

[SEAL.] W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Fred Dennett, being first duly sworn, says that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth on his personal knowledge he knows to be true, and those set forth on information and belief, he believes to be true.

FRED DENNETT.

Subscribed and sworn to this 3rd day of September, 1909.
Before me,

[SEAL.] W. BERTRAND ACKER.

18 EXHIBIT "A."

"H."
A. S. T.
Pocket 13—Case 17874.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 12, 1907.

Address only the Commissioner of the General Land Office.

WILLIAM J. ALEXANDER
vs.
E. MAY INKSTER.

D. L. E. No. 1481.
F. C. No. 604.
Cancellation. Reversed.

Register and Receiver, Evanston, Wyoming.

SIRS: July 20, 1905, E. May Inkster made D. L. E. No. 1481 for the S. W./4 N. E./4, W./2 S. E./4 and S. W./4 Sec. 2, and N. E./4

S. W./4 Sec. 3, T. 34 N., R. 110 W., 6th P. M., September 23, 1905, she submitted final proof and final certificate No. 604 issued October 7, 1905.

May 17, 1906, William J. Alexander filed affidavit of contest against said entry alleging that:

Said land is not desert in character and at the time of entry was, and had been for a number of years thoroughly reclaimed and was then producing a paying crop of hay. That the said E. May Inkster has done nothing to reclaim the said land, has made no ditches or in any way improved the same.

That nearly fifteen years ago, James Westfall, settled upon
19 the said land and reclaimed the same by constructing ditches and fencing the same and by a system of irrigation reclaimed the whole tract.

That subsequent to this, the said Westfall caused the same to be entered by his son Perry Westfall as a desert entry. Later he, for a valuable consideration, assigned the said land to Mrs. Cordelia Fisher, who on discovery that she had more land than she could hold, relinquished the same and E. May Inkster, her niece, entered it as a desert claim on July 20, 1905, and in about two months later made final proof on the same, stating that she had reclaimed the same and complied with the law.

Said affidavit having been submitted to this office you were directed, by letter "H" of January 21, 1907, to order a hearing.

Notice issued and the case came regularly before you for trial June 10, 1907, at which time the contestant appeared in person and by attorney, the contestee appearing by her attorney and testimony was submitted.

July 8, 1907, you jointly rendered a decision as follows:

The evidence in support of the allegations of contest more particularly goes to the character of the land at the time the entry was made; the improvements made by the claimant E. May Inkster towards reclamation and that assignment had been irregularly made to Cordelia Fisher.

From the evidence in the case, finding is made that assignment
from Westfall to Cordelia Fisher or C. Helen Fisher, relin-
20 quishment thereof, and entry under contest and proof thereon, were made by, and under, the advice and instructions of the former Register of this office and that the contestee, E. May Inkster in no manner sought to obtain title wrongfully or fraudulently and that having for years made her home with Fred C. Fisher and having so been benefited by such accommodation and consideration, the conveyance as made by her to the said Fred Fisher is bona fide; finding is also made that the land in controversy was never in condition for final proof under the Desert Land Law until fall of 1905, when proof was made by the said claimant, and that said land, nor any subdivision of it prior thereto had not been reclaimed.

Having fully considered all the evidence in the case and the manner and interest of the different witnesses testifying and the credibility of their testimony and believing that there has not been any

fraud committed by the claimant or her successor in interest and that every possible effort has been made by them to properly comply with the law, the said entry in controversy is sustained, and it is recommended that it be passed to patent.

And from your said decision the contestant appealed.

The land in controversy is situated in Fremont County, State of Wyoming, and the records of this office show that on February 3, 1902, Perry A. Westfall made H. E. No. 2228 for the S. W./4 N. E./4, N. E./4 S. W./4 and W./2 S. E./4 Sec. 2, T. 34 N., R. 110
W., which was canceled by relinquishment July 13, 1903,
21 and on July 31, 1903, William H. Allen made D. L. E. No.
1341, for the same land, and on August 21, 1903, he assigned the same to Cordelia Helen Fisher, wife of Fred C. Fisher, U. S. Commissioner at Fayette, Fremont County, Wyoming. The said D. L. E., was canceled by relinquishment July 15, 1905.

February 10, 1902, the said Perry A. Westfall made D. L. E. No. 1191, for the S. E./4 S. W./4, W./2 S. W./4 Sec. 2 and the N. E./4 S. E./4 Sec. 3, of said township and range and on June 13, 1903, he assigned the same to Cordelia Helen Fisher. The said D. L. E. was also canceled by relinquishment July 1, 1905.

According to Mrs. Fisher's testimony after purchasing the entryman's improvements and securing their deeds to the land, she was informed by Mr. Charles Kingston, then Register of the Evanston Land Office, under date of October 27, 1903, that a person could take 320 acres by assignment even though he had exhausted his rights by entering 320 acres, "that it is the other fellow who is losing his rights when he is making his assignment." Subsequently she was informed that such advice was erroneous and she relinquished the land. It appears that her cousin E. May Inkster, the contestee, who made her home with the Fishers, was present and "spoke up and said, well I will take the land," and so her entry was made five days afterwards.

It appears from the testimony for the contestant, that long before Perry A. Westfall entered the land in 1902, his father, James Westfall was a settler thereon and built some ditches, irrigated a part of the land and raised crops of hay thereon each year. The said
James Westfall deserted his family and his son, Perry A.
22 then entered the land as hereinbefore stated. He also built
more ditches, cleared more land by grubbing the sage brush, irrigated the land and also raised crops of hay thereon each year.

It is shown by the testimony of the Fishers and other witnesses for the contestee that when the land came to them by assignment they also continued the improvements and made others, cleared and irrigated more land, which seems to have been productive for hay only, and each year the crops have increased, until, in 1905, about 200 tons of hay were cut.

It appears from all the testimony, that when the contestee made her entry July 20, 1905, the land had been reclaimed, and that, when she made her final proof, the land was in the same condition as to ditches, fencing and other necessary improvements, including irrigating facilities, as it was when she made her entry, and there is noth-

ing in the evidence, or in her final proof, to show that she ever expended one dollar towards reclaiming or improving the land.

It is shown by the testimony that every act looking to a compliance with the desert land law, as regards the land in controversy, was performed by others, before the defendant entered the land which was after the irrigating season of 1905, had expired, and the crops of hay for that year had matured.

It is shown by the testimony of the Fishers, that the contestee made her home with them during the years 1902, 1903, 1904 and 1905, and the facts as they appear are regarded as significant.

Fisher, who is a U. S. Commissioner, a large land owner
23 and in the cattle business, had used the land and crop therefrom for two years. Failing to secure title thereto, his wife, to whom the land had been assigned by the former entryman, ascertained that she was not qualified to make final proof, consequently, she relinquished, and a member of her household conceived the idea of entering the same, at a date nearly concurrent with Mrs. Fisher's relinquishment, submitted final proof in about two months thereafter, and on December 23, 1905, three months after said final proof, deeded the land to Fisher for a consideration of one dollar and left for Omaha, where the entrywoman was served with notice of contest, at which she did not appear in person. The entry papers, final proof and every paper requiring execution by Inkster were executed before said Fisher as U. S. Commissioner and he certified to the correctness of what purports to be copies of certificates of appropriation of water, issued January 17, 1905, recorded April 24, 1905, said copies appear to have been mutilated by erasures and the name of E. May Inkster written therein, to show that *she* presented to the State Board of Control, proof of the appropriation of water, whereas the alleged copies and the evidence show that C. Helen Fisher obtained and held the water right, and August 18, 1905, she stated in an affidavit, executed before Fred. C. Fisher, U. S. Commissioner, that she had that day sold to E. May Inkster all her right, title and interest therein. The final proof did not contain any statement as to annual expenditures as is required under the rules and regulations regarding proof in desert land entries. In her declaration executed July 17, 1905,

before Fred. C. Fisher, U. S. Commissioner she swore inter
24 alia,

That said land has hitherto been unappropriated, unoccupied and unsettled because it has been impossible to cultivate it successfully an account of its dry and arid condition.

If the entrywoman did not know this to be false, the officer before whom she so declared knew it to be so, as he had been irrigating and cutting hay from the land, averaging more than a ton to the acre, for the two years preceding the entry of the land by Inkster. The evidence submitted leads to the inevitable conclusion that Inkster, the entrywoman, was in collusion with the Fishers and that she made the entry with the intent to convey the title to them.

Without considering other questions presented in the appeal, it is sufficient to state that land that has been effectually reclaimed is not subject to desert land entry. (14 L. D., 194.) The land embraced

herein was unmistakably of that character when Inkster attempted to acquire title thereto by entering same under the desert land laws and her attempt must fail.

Your said decision is reversed, Inkster's final proof is rejected, and D. L. E. No. 1481 is held for cancellation subject to her right of appeal to the Department.

Notify all parties in interest hereof and in due time report all action taken.

Very respectfully,

(Signed) FRED DENNETT,
Assistant Commissioner.

BOARD OF LAW REVIEW,
By W. B. PUGH.

EMW.

25 EXHIBIT "B."

DEPARTMENT OF THE INTERIOR, E. F. B.
L. L. B. WASHINGTON, *April* 25, 1908. D. C. H.
P. E.W.
F.W. C.

D-3280.
G. W. W.

Appeal Affirmed, Holding for Cancellation Desert-land Entry.

Evanston, Wyoming, "H" 13-17874.

WM. J. ALEXANDER
v.
E. MAY INKSTER.

The Commissioner of the General Land Office.

SIR: By decision of December 12, 1907, you reversed the decision of the local officers and held for cancellation the desert-land entry of E. May Inkster, made July 20, 1905, for the S. W. /4 of the N. E. /4, the W. /2 of the S. E. /4, and the S. W. /4 of section 2, and the N. E. /4 of the S. W. /4 of Section 3, T. 34 N., R. 110 W., Evanston, Wyoming, upon which she submitted final proof and received final certificate October 7, 1905.

May 7, 1906, Wm. J. Alexander filed a contest against said entry, alleging that—

said land is not desert in character and at the time of entry was, and had been for a number of years, thoroughly reclaimed and was then producing a paying crop of hay. That the said E. May Inkster has done nothing to re-claim the said land, has made no ditches or in any way improved the same.

That, nearly fifteen years ago one James Westfall settled upon the said land and reclaimed the same by constructing ditches and

fencing the same and by a system of irrigation reclaimed the whole tract.

That subsequently to this the said Westfall caused the same to be entered by his son Perry Westfall, as a desert entry. Later, he, for a valuable consideration, assigned the said land to Mrs. Cordelia Fisher, who, on discovery that she had more land than she could hold, relinquished the same, and E. May Inkster, her niece entered it as a desert claim, on July 20th, 1905, and in about two
26 months later made final proof on the same, stating that she had reclaimed the same and complied with the law.

Upon the filing of said affidavit the local officers were directed to order a hearing, at which both parties offered testimony, the claimant appearing by attorney.

The material facts in the case have been substantially set forth in the decision of your office and are correctly stated. Immediately prior to the entry of Miss Inkster the lands were covered by the desert-land entries of Perry A. Westfall and William H. Allen which were held by Mrs. Cordelia Helen Fisher as assignee, the former having been assigned June 13, 1903, and the latter August 21, 1903. At the time of the execution of those assignments Mrs. Fisher had exhausted her right under the desert-land act by entry of 320 acres. The purchase of the improvements and the rights under the Westfall and Allen entries were made upon the advice of the then Register of the Evanston land office to the effect that a person can take by assignment 320 acres even though he has exhausted his personal right by having entered 320 acres.

Miss Inkster was not present at the trial, she having previously thereto parted with all her interest in the land. Her principal witness was Mrs. Fisher, who testified that in 1904 having learned that the assignments were illegal and that she could not perfect the entries thereunder, wrote to the Register of the land office stating what she had heard, who promised to take the matter up with the General Land Office and get it straightened out, and said that the entryman would not lose anything by the mistakes of its officers.
27 He subsequently wrote to witness that she had better relinquish the entries, which she did. She testified: "I read this letter in my house, and my cousin, Miss Inkster, * * * spoke up and said, 'Well, I will take that land.'" Mr. Fisher was in Omaha with beef that day. He knew nothing about this matter until his return, when she told him what had been done.

Witness said that "Mr. Kingston (the register) wrote that as soon as I relinquished the land back to the Government Miss Inkster could file upon it, which she did;" that as soon as Miss Inkster's declaratory statement was received she could give publication notice for final proof, as it made no difference who did the work.

Final proof was submitted by Miss Inkster October 7, 1905, and on December 23 following she conveyed the land by deed to Fred C. Fisher, the husband of the witness whose testimony is referred to above.

Miss Inkster at the time of her entry and of the execution of the deed to Fisher was a member of the Fisher household and had been

since August 28, 1903. She continued to reside with them until June 15, 1906, when she left for Omaha.

With reference to the conveyance of the land by Miss Inkster to Fisher, his wife testified:

She gave a warranty deed to Mr. Fisher, my husband. She would have given it to me, but I thought it would be nice to give it to him. He knew nothing about it. It was all done without his knowledge. I could have had it instead of him. It was her pleasure to give it to me. It was my pleasure to give it to my husband.

With reference to the condition of the land the testimony shows that it was practically reclaimed when Miss Inkster's entry was made.

28 There is another significant fact connected with this entry to which attention is called in your decision: The declaration and all other entry papers were made before Fred C. Fisher as United States commissioner, to whom the entryman conveyed the land. A certificate of appropriation of water evidently issued to Mrs. C. Helen Fisher by the State Board of Control January 17, 1905, shows that the name of the true applicant was erased and the name of "E. May Inkster" inserted in its place.

This is apparent from the fact that whoever caused the erasure of the true appropriation omitted to make the same alteration in the certificate of the commissioner, "that the foregoing is a true and correct copy of the original certificate of appropriation of C. Helen Fisher under permit No. 874."

There is nothing in the testimony to show that Miss Inkster had at that date an application for a water right. On the contrary, it does not appear that she contemplated making an entry until the relinquishment of Mrs. Fisher, who testified that she sold her water right to Miss Inkster that she had obtained.

The relationship of the parties, the condition under which the relinquishment of Mrs. Fisher was filed, and the entry of Miss Inkster was made, together with the conveyance of the land to Fred C. Fisher so soon after entry tend strongly in themselves to indicate that the entry was not made in good faith, but for the benefit of those who ultimately acquired whatever right the entryman had, but when the circumstances of the conveyance *is* considered

29 in the light of the *light of the* explanation of Mrs. Fisher with the suspicious circumstances attending the execution of the entry papers, it is impossibe to avoid the conclusion, upon any reasonable ground, that this entry was made solely in the interest of Mrs. Fisher, who was not qualified to complete the entries of Westfall and Allen and that it was used as a subterfuge to accomplish indirectly what could not be done directly.

Your decision is affirmed, and the papers are returned herewith.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

Replication.

Filed Sep. 15, 1909.

* * * * * * *

The complainant hereby joins issue with the defendants.

WEBSTER BALLINGER,
Solicitor for Complainant.

30 *Stipulation of Facts.*

Filed May 25, 1910.

* * * * * * *

It is hereby stipulated by and between the respective parties to the above-entitled cause that the following are facts appearing of record in the Department of the Interior, and that the same as appearing herein are offered in evidence by the parties thereto.

It is further agreed that either party may produce at the trial for the convenience of the court the original of any document or record herein referred to.

WEBSTER BALLINGER,
Attorneys for Plaintiff.
OSCAR LAWLER,
F. W. CLEMENTS,
C. EDW. WRIGHT,
Attorneys for Defendant.

The land in controversy is in the SW./4 of NE./4, the W./2 of SE./4, and the SW./4 of Sec. 2 and the NE./4 of SW./4 of Sec. 3, T. 34 N., R. 110 W., Evanston land district, Wyoming.

In 1902, the land being subject to desert-land entry, one Perry A. Westfall made such entry as to a portion of said land and thereafter, on June 21, 1903, executed a quitclaim deed purporting to assign his interest to Cordelia Helen Fisher, wife of this plaintiff; that on August 21, 1903, William H. Allen, who had entered the residue of said land, also executed a quitclaim deed purporting to assign
31 his interest therein to the said C. Helen Fisher.

In 1905, Mrs. Fisher discovered that she was disqualified to enter the land and the entry was canceled by relinquishment, July 15, 1905.

That thereafter one E. May Inkster subscribed to and verified on her oath before Fred C. Fisher, as United States Commissioner, her declaration of intention to reclaim the land in controversy under the provisions of the desert land laws; said declaration being executed upon the form (4-274) prescribed by law and purporting to bear the date of July 17, 1905; that said declaration was accompanied by affidavits of Sylvia M. Stadin and Gerhard N. Stadin, by the affidavit of E. May Inkster explaining why her application was not

filed at the United States land office at Evanston, Wyoming, in person, by a plat purporting to show her contemplated plan of reclamation and irrigation, by her "non-mineral" affidavit (Form 4-062), and by her affidavit (Form 4-102*b*) of qualification to make entry; all of said affidavits purporting to have been executed on July 17, 1905, before Fred C. Fisher, United States Commissioner.

That thereafter and on July 20, 1905, the register and receiver of the United States land office at said Evanston issued their joint certificate on the form prescribed by law (Form 4-199), certifying that the said E. May Inkster had filed, as aforesaid, her declaration of intention to reclaim said land.

That thereafter and on July 29, 1905, the register of the United States land office at Evanston, Wyoming, wrote and caused
32 to be delivered to said E. May Inkster a communication in words and figures following:

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
EVANSTON, WYOMING, *July* 29, 1905.

E. May Inkster, Fayette, Wyoming.

MADAM: Referring to your application to make final proof before Fred C. Fisher, U. S. Commissioner, on your D. L. E. No. 1482, you are advised that Rule 10 of Circular "P", January 25, 1904, issued by the General Land Office, directs this office, as follows:

"You will advise applicants desiring to make final proofs before other officers that such a course may cause delay in the completion of their claims, inasmuch as they may require examination by a special agent."

In view thereof please state, as soon as practicable, whether you still desire to have your final proof taken before said officer or before this office. Return this with your reply noted on the back hereof.

Respectfully, CHAS. KINGSTON, *Register.*

That the said communication bears on its back the following indorsement:

I will make my Proof before Fred C. Fisher, U. S. Com.
E. MAY INKSTER.

That thereafter and on August 10, 1905, the said E. May Inkster gave notice that on September 23, 1905, she would make proof on her desert-land claim No. 1481, being for the land herein involved, before Fred C. Fisher, United States Commissioner.

That on August 18, 1905, said Cornelia Helen Fisher sold and conveyed to said E. May Inkster a certain water right, evidenced by a written statement in words and figures following:

I have this day sold to E. May Inkster all my right and title in water app. #874. Also all right to the old Territorial ditch,
33 no number, but date of appropriation June 1889.
C. HELEN FISHER.

Sworn to before me this 18th day of Aug. 1905.

FRED C. FISHER,
U. S. Commissioner.

That thereafter and on September 23, 1905, the said E. May Inkster made and filed at the Evanston land office aforesaid final proof of the reclamation of said tract of land, the said final proof being executed before Fred C. Fisher, the plaintiff, then a U. S. Commissioner; that in said proof she, the said E. May Inkster, swore that she had "the sole and entire interest in said entry, and in the tract covered thereby, and in the right to the water sufficient to continuously irrigate the same" and that no other person, individual, company, or corporation had any interest whatever in said entry, tract, or water appropriation." That upon presentation of said proof at the land office aforesaid and upon payment of the fees and charges required by law (in this instance $400), the register of said land office on October 7, 1905, made and executed a "final certificate," of which the following is a photographic copy of the original now on file in the General Land Office;

Desert Land Act of March 3, 1877.

Register's Final Certificate, No. 604.

Declaration No. 1481.

LAND OFFICE AT EVANSTON, WYO.,
Oct. 7th, 1905.

It is hereby certified, That in pursuance of the act of Congress approved March 3, 1877, entitled "An act to provide for the
34 sale of Desert Lands in certain States and Territories," E. May Inkster, of Fremont County, State of Wyoming, has purchased of the Register of this office, and made payment in full for the land described as follows, to wit:

S. W. /4 N. E. /4: W. /2 S. E. /4: S. W. /4 Sec. 2 and N. E./4 S. E. /4, Sec. 3 Tp. 34 N. R. 110 W, 6th P. M.

containing 320 acres, at the rate of one dollar and twenty-five cents per acre, amounting to 400 dollars.

Now therefore be it known, That on presentation of this certificate to the Commissioner of the General Land Office, the said E. May Inkster shall be entitled to receive a patent for the tract of land above described.

CHAS. KINGSTON, *Register.*

NOTE.—See original Declaration and receipt, No. —.

That the said final certificate bears on the reverse side thereof indorsement of which the following is a photographic copy:

Apr. 26/06 Contest Affidavit rejected Right of Appeal McD "H" Jan. 21/07. Hearing allowed on Alexander's affidavit. McD.

Register's Final Certificate.
"H" April 13, 1907. Westfall's application denied, subject to appeal W. B. N.

Desert land act March 3, 1877.

U. S. Land Office
at
Evanston, Wyo.

May 2", '08. No. 604. J. L. M.
35 June 1908. Entry.

Canceled by "H." J. L. M.
Canceled P—June 24, '09.
B. H. G.
"P."
113–25.

That at the time of filing final proof as aforesaid, the said E. May Inkster caused to be filed in the office of the register and receiver at said Evanston land office, copies of two certificates of appropriation of water, the same bearing the following headings, respectively:

The State of Wyoming
Certificate of appropriation of water
Certificate Record No. 6, page 86"

and

"The State of Wyoming
Certificate of appropriation of water
Certificate record No. 6, page 88.

and each reciting that

"Whereas E. May Inkster had presented to the Board of control of the State of Wyoming proof of appropriation," etc.;

and each being certified by Fred C. Fisher, as United States commissioner that the same were true and correct copies of the original certificates of appropriation.

That thereafter and on December 23, 1905, the said E. May Inkster executed and delivered to Fred C. Fisher, the plaintiff, a war-

ranty deed purporting to convey the land so entered by her as aforesaid to said Fisher, in consideration of the sum of one dollar; the said deed being acknowledged before C. Helen Fisher, notary public.

That on May 17, 1906, William J. Alexander signed, verified on his oath and caused to be filed at the United States land office
36 at Evanston, Wyoming, a contest affidavit praying that the desert-land entry No. 1481 of said E. May Inkster be canceled and forfeited to the United States, which said contest affidavit contained the following allegations, to wit:

that said land is not desert in character and at the time of entry was, and had been for a number of years, thoroughly re-claimed and was then producing a paying crop of hay. That the said E. May Inkster has done nothing to re-claim the said land, had made no ditches or in any way improved the same.

That nearly fifteen years ago one James Westfall settled upon the said land and reclaimed the same by constructing ditches and fencing the same and by a system of irrigation reclaimed the whole tract.

That subsequent to this the said Westfall, caused the same to be entered by his son Parry Westfall, as a desert entry. Later, he, for a valuable consideration, assigned the said land to Mrs. Cordelia Fisher, who, on discovery that she had more land than she could hold, relinquished the same, and E. May Inkster, her niece entered it as a desert claim, on July 20th, 1905, and in about two months later made final proof on the same, stating that she had reclaimed the same and complied with the law. That affiant desires that these facts may be established and the said entry canceled, that he may be enabled to make a homestead entry on a part of said land, and establish a home thereon.

37 That thereafter and on June 10, 1907, after due notice to the parties, the said contest of William J. Alexander against said E. May Inkster came on to be heard before the register and receiver of the United States land office at Evanston, Wyoming, the said Inkster and Fred C. Fisher being represented by counsel and C. Helen Fisher and Fred C. Fisher being present and testifying; that thereafter, to wit, on July 8, 1907, the said register and receiver rendered their joint decision in words and figures following:

Contest proceedings having been initiated by William J. Alexander against D. L. E. No. 1481 made on July 20th, 1905, at this office, by E. May Inkster, for the S. W./4 N. E./4 the W./2 S. E./4 and the S. W./4:—of Sec. 2, and the N. E./4 S. E./4 of Sec. 3, T. 34 N., R. 110 W., Final certificate having been issued thereon September 23, 1905, bearing number 604 to the said Claimant, and the Honorable Commissioner of the General Land Office having by letter "H" to this office of date of April 13th, 1907, having directed a hearing, and all parties in interest having been notified, and the cause coming on regularly for hearing on the 10th day of June, 1907, at Ten o'clock A. M. and the contestant and contestee appearing by their attorneys and having signified their readiness for the taking of testimony, evidence at length was adduced and submitted by both of said parties in interest.

The evidence in support of the allegations of contest more particularly goes to the character of the land at the time the
38 entry was made; the improvements made by the claimant E. May Inkster toward reclamation and that assignment had been irregularly made to Cordelia Fisher.

From the evidence in the case, finding is made that assignment from Westfall to Cordelia Fisher or C. Helen Fisher, relinquishment thereof and entry under contest and proof thereon, were made by and under the advice and instructions of the former, Register of this office, and that the contestee, E. May Inkster in no manner sought to obtain title wrongfully or fraudulently, and that having for years made her home with Fred C. Fisher and having so been benefited by such accommodation and consideration, the conveyance as made by her to the said Fred C. Fisher is bona fide; finding is also made that the land in controversy was never in condition for final proof under the Desert Land Law until the fall of 1905, when proof was made by the said claimant and that said land, nor any subdivision of it prior thereto had not been reclaimed.

Having fully considered all the evidence in the case and the manner and interest of the different witnesses testifying and the credibility of their testimony and believing that there has not been any fraud committed by the claimant or her successor in interest and that every possible effort has been made by them to properly comply with the law, the said entry in controversy is sustained and it is recommended that the same be passed to patent.

That at said hearing it appeared in evidence that C. Helen
39 Fisher came into possession of the land in controversy in 1903 by assignment from former entryman and that she was advised by the register of the United States land office at Evanston, Wyoming, that she was qualified to make entry of said land under the desert land law, which said advice it is conceded was erroneous, the said C. Helen Fisher having in law and fact, prior to 1903, exhausted her right to take public land of the United States; that she paid about $1200 to secure the assignments of the entrymen aforesaid and thereafter, until July, 1905, was in possession of said land, either by herself or her husband, the plaintiff, expending large sums of money in reclaiming, irrigating, and cutting hay from said land; that in July, 1905, she was advised that she could not obtain patent to said land by reason of having theretofore exhausted her right to take public land and she thereupon relinquished her entry as aforesaid, upon the advice of said register.

That at and during said hearing before said register and receiver C. Helen Fisher, wife of the plaintiff, herein, was sworn as a witness and testified, in behalf of the entrywoman and the plaintiff, in part, upon direct examination, as follows:

Q. And did you relinquish it? A. I did. And I read this letter in my home, and my cousin, Miss Inkster, who is not Mr. Fisher's niece but my own cousin, and introduced in my own home to Mr. Charles Alexander as my cousin, Miss Inkster—and Cousin May spoke up and said, "Well, I will take that land." Mr. Fisher was

in Omaha with beef *at* that day. He knew nothing about this matter.

40 Q. Nothing about this matter? A. No, not about May. He was away. As soon as Mr. Fisher got home I told him I had relinquished that land back to the Government. Mr. Kingston wrote that as soon as I relinquished that land back to the Government Miss Inkster could file upon it, which she did.

Q. You kept this office thoroughly advised as to what you did? A. Yes, sir; I think I did, about every day.

Q. What was then done? A. He said as soon as Miss Inkster's declaratory receipt was received she could give publication notice for final proof. He said "it is no difference who does the work. Miss Inkster couldn't do it." I suppose he meant by that she is a woman. She couldn't grub sage brush. She couldn't dig ditches.

Q. This Miss Inkster you speak of, how long had she been at your home? A. She was with us nearly four years. She came to Wyoming on August 28th, Tuesday evening, six o'clock, and she left on Saturday morning, June 15, 1906. She came in 1903 and left in 1906.

Q. Where is her home? A. Her home is with us as much as with any one else. She was called to her brother in Omaha last June, who was sick; from there to Michigan on account of sickness of an aunt; then to Omaha, on account of sickness; and again to Michigan on account of sickness, or she would be with us here today.

41 Q. After the submission of proof in the Inkster entry, what was done with the land? A. Well, in that fall, the hay was cut.

Q. I mean in the way of conveyance, if anything? A. Oh, to me.

Q. To you or any one else? A. She gave a warranty deed to Mr. Fisher, my husband. She would have given it to me, but I thought it would be nice to give it to him. He knew nothing about it. It was all done without his knowledge. I could have had it instead of him. It was her pleasure to give it to me. It was my pleasure to give it to my husband.

That at said hearing before said register and receiver, the plaintiff was sworn as a witness and testified in his own behalf and in behalf of the entrywoman, upon direct examination, in part, as follows:

Q. And when was the first time, Mr. Fisher, from your knowledge of the land and from your knowledge of irrigation, that this land was in such condition that final proof could be made upon it? A. Well, we didn't consider that it would be in such shape that we could make a genuine proof on it until 1905, because it never was finished until that year. These forty acres was grubbed this year, part of the two forties was grubbed the season before and a part that year. I didn't drive off the road when there was snow on the ground and look at it, as testified to by my friend, Mr. Redman. I drove a mowing machine on the property.

42 Q. How come this land to be conveyed to you by Miss Inkster? A. Well, I can't tell that. Miss Inkster made it her home with us, and I suppose she felt grateful for it.

Knowing that we put the money up for all the improvements and that we had given her a home as long as she wanted to stay with us. It is her home today. And she said to Mrs. Fisher, "I am going to deed this to Fred", so Mrs. Fisher told me

* * * * * * *

Q. That land has been made more valuable in the past two years by reason of your attention and extension of the irrigation? A. Yes, sir; we do something all the time. Now, I had in 1905, there were two men there all summer—the one constant and the other fellow part of the time. Then the haying crew. I was there and the boy was there with them. They was always grubbing sage-brush and filling the place in on the east forty that was rough. There is only about half that cuts hay yet, but we are getting water over it. There is sort of soak holes in it. We hauled manure on it and took the snow brush off. We are getting it in better shape every year.

Q. I want to ask you if you ever entered into any contract or any agreement or any conspiracy in any way with Miss Inkster in order to get title to this land? A. I never mentioned anything. It was Mrs. Fisher's as it stood and she was perplexed to death with Mr. Kingston's letters with the advice she got. I think he did
43 it all being ignorant in the matter, as he states in the letter "the other fellow loses his rights." I have nothing against Mr. Kingston, I think he was conscientious in the matter—it misled Mrs. Fisher just the same, and we had put quite a lot of money in it. When she got the letter, she read it to Miss Inkster, and she said "I have got to relinquish that land," and Miss Inkster said "I will take it," so she tells me, and I never mentioned it to her in any way and she never got a dollar of my money. I won't say a dollar. I guess the consideration has to be a dollar to make it legal, but she got no sum of money whatever.

Q. Excepting what you had done in the way of courtesy, boarding her, making her home there? A. She made her home there and whenever she wanted money, we gave it to her.

Q. That is the only way you have ever paid for this land? A. Yes. I sent her money for a ticket. She wanted to come out into this country for her health. She is a woman forty years old.

That after the rendition of the decision by the Register and Receiver as aforesaid, the said William J. Alexander took, in due course, an appeal from said decision to the Commissioner of the General Land Office, and that the latter officer, on December 12, 1907, reversed said decision of said Register and Receiver, and held the entry aforesaid for cancellation; the said decision being in words and figures as follows (omitting the formal introductory por-
44 tion thereof): The land in controversy is situated in Fremont County, State of Wyoming, and the records of this office show that on Febraury 3, 1902, Perry A. Westfall made H. E. No. 2228 for the S. W./4 N. E./4 N. E./4 S. W./4 and W./2 S. E./4 Sec. 2, T. 34 N., R. 110 W., which was cancelled by relinquishment July 13, 1903; and on July 31, 1903 William H. Allen made D. L. E. No.

1341, for the same land, and on August 21, 1903, he assigned the same to Cordelia Helen Fisher, wife of Fred C. Fisher, U. S. Commissioner at Fayette, Fremont County, Wyoming. The said D. L. E., was canceled by relinquishment July 15, 1905.

February 10, 1902, the said Perry A. Westfall made D. L. E. No. 1191, for the S. E./4 S. W./4 W./2 S. W./4 Sec. 2 and the N. E./4 S. E./4 Sec. 3, of said township and range and on June 13, 1903, he assigned the same to Cordelia Helen Fisher. The said D. L. E. was also canceled by relinquishment July 15, 1905.

According to Mrs. Fisher's testimony after purchasing the entryman's improvements, and securing their deeds to the land, she was informed by Mr. Charles Kingston, then Register of the Evanston land office, under date of October 27, 1903, that a person could take 320 acres by assignment, even though he had exhausted his rights by entering 320 acres, "that it is the other fellow who is losing his rights when he is making his assignment." Subsequently she was informed that such advice was erroneous and she relinquished the land. It appears that her cousin, E. May Inkster, the con-
45 testee, who made her home with the Fishers, was present and "spoke up and said, well I will take the land," and so her entry was made five days afterwards.

It appears from the testimony for the contestant that long before Perry A. Westfall entered the land in 1902, his father, James Westfall was a settler thereon and built some ditches, irrigated a part of the land and raised crops of hay thereon each year. The said James Westfall deserted his family and his son, Perry A. then entered the land as hereinbefore stated. He also built more ditches, cleared more land by grubbing the sage brush, irrigated the land and also raised crops of hay thereon each year.

It is shown by the testimony of the Fishers and other witnesses for the contestee that when the land came to them by assignment they also continued the improvements and made others, cleared and irrigated more land, which seems to have been productive for hay only, and each year the crops have increased, until, in 1905, about 200 tons of hay were cut.

It appeares from all the testimony, that when the contestee made her entry July 20, 1905, the land had been reclaimed, and that, when she made her final proof, the land was in the same condition as to ditches, fencing and other necessary improvements, including irrigating facilities, as it was when she made her entry, and there is nothing in the evidence or in her final proof, to show that she ever expended one dollar towards reclaiming or improving the land.

46 It is shown by the testimony that every act looking to a compliance with the desert land law, as regards the land in controversy, was performed by others, before the defendant entered the land which was after the irrigating season for 1905, had expired, and the crops of hay for that year had matured.

It is shown by the testimony of the Fishers, that the contestee made her home with them during the years 1902, 1903, 1904 and 1905, and the facts as they appear are regarded as significant.

Fisher, who is a U. S. Commissioner, a large land owner and in the cattle business, had used the land and crops therefrom for two years. Failing to secure title thereto, his wife, to whom the land had been assigned by the former entryman, ascertained that she was not qualified to make final proof, consequently, she relinquished, and a member of her household conceived the idea of entering the same, at a date nearly concurrent with Mrs. Fisher's relinquishment, submitted final proof in about two months thereafter, and on December 23, 1905, three months after said final proof, deeded the land to Fisher for a consideration of one dollar, and left for Omaha, where the entrywoman was served with notice of contest, at which she did not appear in person. The entry papers, final proof and every paper requiring execution by Inkster were executed before said Fisher as U. S. Commissioner and he certified to the correctness of

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what purports to be copies of certificates of appropriation of water, issued January 17, 1905, recorded April 24, 1905, said copies appear to have been mutilated by erasures and the name of E. May Inkster written therein, to show that *she* presented to the State board of Control, proof of the appropriation of water, whereas the alleged copies and the evidence show that C. Helen Fisher obtained and held the water right, and August 18, 1905, she stated in an affidavit, executed before Fred C. Fisher, U. S. Commissioner, that she had that day sold to E. May Inkster all her right, title and interest therein. The final proof did not contain any statement as to annual expenditures as is required under the rules and regulations regarding proof in desert land entries. In her declaration, executed July 17, 1905, before Fred C. Fisher, U. S. Commissioner she swore inter alia, that said land has hitherto been unappropriated, unoccupied and unsettled because it has been impossible to cultivate it successfully on account of its dry and arid condition.

If the entrywoman did not know this to be false, the officer before whom she so declared knew it to be so, as he had been irrigating and cutting hay from the land, averaging more than a ton to the acre, for the two years preceding the entry of the land by Inkster. The evidence submitted leads to the inevitable conclusion that Inkster, the entrywoman, was in collusion with the Fishers and that she made the entry with the intent to convey the title to them.

48

Without considering other questions presented in the appeal, it is sufficient to state that land that has been effectually reclaimed is not subject to desert land entry (14 L. D., 194). The land embraced herein was unmistakably of the character, when Inkster attempted to acquire title thereto by entering same under the desert land laws and her attempt must fail.

Your said decision is reversed, Inkster's final proof is rejected, and D. L. E. No. 1481 is held for cancellation, subject to her right of appeal to the Department.

Notify all parties in interest hereof and in due time report all action taken.

That thereafter, and in due course, an appeal was taken in behalf of said E. May Inkster from the decision of the Commissioner of the General Land Office to the Department of the Interior, and on

April 25, 1908, the First Assiatant Secretary thereof rendered decision, addressed to the Commissioner of the General Land Office, in words and figures following (omitting the formal introductory portion thereof:

The material facts in the case have been substantially set forth in the decision of your office and are correctly stated. Immediately prior to the entry of Miss Inkster the lands were covered by the desert-land entries of Perry A. Westfall and William H. Allen which were held by Mrs. Cordelia Helen Fisher as assignee, the former having been assigned June 13, 1903, and the latter
49 August 21, 1903. At the time of the execution of those assignments Mrs. Fisher had exhausted her right under the desert-land act by entry of 320 acres. The purchase of the improvements and the rights under the Westfall and Allen entries were made upon the advice of the then Register of the Evanston land office to the effect that a person can take by assignment 320 acres even though he has exhausted his personal right by having entered 320 acres.

Miss Inkster was not present at the trial, she having previously parted with her interest in the land. Her principal witness was Mrs. Fisher, who testified that in 1904 having learned that the assignments were illegal and that she could not perfect the entries thereunder, wrote to the Register of the land office stating what she had heard, who promised to take the matter up with the General Land Office and get it straightened out, and said that the entryman would not lose anything by the mistakes of its officers. He subsequently wrote to witness that she had better relinquish the entries, which she did. She testified: "I read this letter in my house, and my cousin, Miss Inkster * * * spoke up and said 'Well, I will take that land.'" Mr. Fisher was in Omaha with beef that day. He knew nothing about this matter until his return, when she told him what had been done.

Witness said the "Mr. Kingston (the Register) wrote that as soon as I relinquished the land back to the Government Miss Ink-
50 ster could file upon it, which she did:" that as soon as Miss Inkster's declaratory statement was received she could give publication notice for final proof, as it made no difference who did the work.

Final proof was submitted by Miss Inkster October 7, 1905, and on December 23 following she conveyed the land by deed to Fred C. Fisher, the husband of the witness whose testimony is referred to above.

Miss Inkster at the time of her entry and of the execution of the deed to Fisher was a member of the Fisher household and had been since August 28, 1903. She continued to reside with them until June 15, 1906, when she left for Omaha.

With reference to the conveyance of the land by Miss Inkster to Fisher, his wife testified:

She gave a warranty deed to Mr. Fisher, my husband. She would have given it to me, but I thought it would be nice to give it to him. He knew nothing about it. It was all done without his knowledge.

I could have had it instead of him. It was her pleasure to give it to me. It was my pleasure to give it to my husband.

With reference to the condition of the land the testimony shows that it was practically reclaimed when Miss Inkster's entry was made.

There is another significant fact connected with this entry to which attention is called in your decision: The declaration and all other entry papers were made before Fred C. Fisher as United
51 States Commissioner, to whom the entryman conveyed the land. A certificate of appropriation of water evidently issued to Mrs. C. Helen Fisher by the State Board of Control January 17, 1905, shows that the name of the true applicant was erased and the name of "E. May Inkster" inserted in its place.

This is apparent from the fact that whoever caused the erasure of the true appropriation omitted to make the same alteration in the certificate of the commissioner, "that the foregoing is a true and correct copy of the original certificate of appropriation of C. Helen Fisher under permit No. 874."

There is nothing in the testimony to show that Miss Inkster had at that date an application for a water right. On the contrary, it does not appear that she contemplated making an entry until the relinquishment of Mrs. Fisher, who testified that she sold her water right to Miss Inkster that she had obtained.

The relationship of the parties, the conditions under which the relinquishment of Mrs. Fisher was filed and the entry of Miss Inkster was made, together with the conveyance of the land to Fred C. Fisher so soon after entry tend strongly in themselves to indicate that the entry was not made in good faith, but for the benefit of those who ultimately acquired whatever right the entryman had, but when the circumstances of the conveyance *is* considered in the light
52 of the *light of the light of the* explanation of Mrs. Fisher with the suspicious circumstances attending the execution of the entry papers, it is impossible to avoid the conclusion, upon any reasonable ground, that this entry was made solely in the interest of Mrs. Fisher, who was not qualified to complete the entries of Westfall and Allen and that it was used as a subterfuge to accomplish indirectly what could not be done directly.

Your decision is affirmed, and the papers are returned herewith.

That thereafter and in due course the said E. May Inkster filed a motion for review of said departmental decision of April 25, 1908, and that said motion was overruled June 3, 1908, by a decision rendered by the First Assistant Secretary of the Interior in words and figures following:

This motion is filed by E. May Inkster for review of the decision of the Department of April 25, 1908, affirming the decision of your office holding for cancellation the desert land entry of E. May Inkster for the S.W./4 N.E./4 W./2 S.E./4 and S.W./4 Section 2, and the N.E./4 S.W./4, Section 3, T. 34 N., R. 110 W., Evanston, Wyoming, upon which final certificate issued October 7, 1905.

The material allegations of error are substantially embraced in the following grounds.

1. That the findings of fact by the register and receiver were conclusive and the Secretary of the Interior had no legal authority to reverse said findings.

53 2. That it was error to find fraud, conspiracy, or collusion between the entryman and others, as no such charge was made in the contest and that question was not put in issue by the contest.

3. That the contestant had no legal contestable status having at the time of the contest an application for homestead entry of other lands.

As to the first ground of alleged error, the right of the Commissioner of the General Land Office under the supervision of the Secretary of the Interior, to review, and reverse, modify or affirm any decision of the register and receiver having for its object the alienation or disposition of a portion of the public lands, has been so clearly and definitely settled by the decisions of the Supreme Court as to be no longer a matter of controversy. Barnard's Heirs v. Ashley's Heirs, 18 How., 43; Johnson v. Towsley 13 Wall., 72; Knight v. Land Association, 142 U. S., 161; Orchard v. Alexander, 157 U. S. 372.

In the case last cited, it was contended, as in this, that the decision of the register and receiver is not subject to reexamination by the Commissioner of the General Land Office or the Secretary of the Interior as to the facts found by them, but is a final adjudication as to those matters which *is* binding and conclusive upon every one.

In disposing of this contention the Court, citing several decisions of that court in which the question was presented, distin-

54 guished between those cases arising under the earlier acts of Congress making the decisions of the register and receiver final in all cases where no supervisory power was given by statute, as in the case of Lytle v. Arkansas (9 How., 314, 332) and cases arising after the act of July 4, 1836 (5 Stat., 107) in which the decision of the Court is uniformly in favor of the power of the general officers of the Land Department to renew and correct the action of the subordinate officials in all matters relating to the sale and disposal of public lands, as in Barnard's Heirs v. Ashley's Heirs, *Supra,* and other decisions noted by the Court.

Speaking with reference to the general power of supervision over all acts of the local officers and especially with reference to the power to review their findings of facts, the Court said:

Great inequalities in the administration of the Land Department of the United States would inevitably ensue if the final determination of matters connected with the sale and disposal of the public lands was left to a multitude of local land officers. The character and amount of testimony which would be held sufficient in one State and by one set of officers would be held insufficient in another State and by another set. Local influences might help or hinder individuals in acquiring titles to the public lands. Obviously, in order that equal justice might be administered it was necessary that there

should be a superintendence of all the actions of the local
55 land officers and all the proceedings in the local land offices.

And so it was that Congress made the several provisions which we have noticed for control by the general officers of the Land Department of proceedings for the survey, sale, and disposal of the public lands.

When the courts say that a final certificate can be no more canceled than a United States patent, they have reference to final certificates properly obtained and in accordance with law. As decided in Cornelius v. Kessel (128 (U. S., 456) the power to renew and set aside the action of the local officers is not arbitrary and unlimited, but that does not prevent judicial inquiry. There is nothing in that decision or in any other decision of the court, in cases arising since the act of July 4, 1836, that forbids the Commissioner of the General Land Office or the Secretary of the Interior from ascertaining and determining whether the finding of the local officers is sustained by the testimony and whether such certificate was properly issued.

The decision of your office holding this entry for cancellation was sutsained by the Department for the reason that the testimony led to the conclusion that the entry was made solely for the benefit and in the interest of Mrs. Cordelia Helen Fisher, who was not qualified to complete the entries of her assignors, Westfall and Allen, and that the entry by this claimant was used as a subterfuge to accomplish indirectly what could not be done directly.

56 It was urged before the Department upon the hearing of the appeal, and also upon this motion for review, that the entry should not be canceled for the reason that Mrs. Fisher purchased the assignment from Westfall and Allen upon the erroneous advice of the receiver of the local office that she was not prohibited from taking by assignment 320 acres under the desert land law, although she had exhausted her personal right by entering 320 acres. That she relinquished the land also under his advice and direction, and that as her good faith and the good faith of Miss Inkster is shown beyond question by placing absolute reliance on the advice of this officer of the Government, and obeying his instructions implicitly, they should not lose their property and their rights because they obeyed such advice and instructions.

It is evident that Mrs. Fisher will sustain great loss because of her inability to make available her rights under the assignments of Westfall and Allen, unless she can recover from her assignors. The rights assigned to her by Westfall and Allen were valuable rights, for which a large consideration was paid, and there appears to be many equities in her favor by reason of her expenditure of money on the erroneous advice of the Government officer, if the Department was not powerless to recognize in her any right under said assignment. But it cannot be seen how she can be affected by the cancellation of this entry, except upon the theory that
57 her relinquishment of a valuable right without compensation and the entry of Miss Inkster were designed to accomplish indirectly what could not be accomplished under her assignment.

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57 her relinquishment of a valuable right without compensation and the entry of Miss Inkster were designed to accomplish indirectly what could not be accomplished under her assignment.

That is the view the Department took of the case, and it is immaterial whether it was charged in the contest or not. The Government will investigate for itself every question, in order that no portion of the public land shall be disposed of to a person not entitled to it.

It is also immaterial whether the contestant was qualified to enter public land or not. Every contest is a proceeding by the Government, whether it be prosecuted through its accredited agents or by the aid of individual contests.

John N. Dickinson (35 L. D., 67-70).

The motion is denied and the papers are returned herewith.

Very respectfully,

FRANK PIERCE,
First Assiatant Secretary.

That thereafter, and in due course, counsel for the plaintiff in this action, filed a motion for re-review of the departmental decision of April 25, 1908, aforesaid, supporting said motion by affidavits of which the following are copies:

STATE OF WYOMING,
County of Fremont:

I, E. May Inkster being duly sworn deposes and says that
58 I entered the S.W./4 N.E./4 W./2 S.E./4, and S.W./4, Sec. 2 and the N.E./4 S.W./4 Sec. 3 T. 34 N., R. 110 of my own free will without any advice whatever and entered into no contract verb*le* or writing with my cousin C. Helen Fisher or her husband Fred C. Fisher,

I entered this land for my own sole benefit, I had Mr. Fisher do the work and improvements for me, there was no collusion between Fred C. Fisher, and wife and myself, I made it my home with Fred C. Fisher and family for years and it is my home today except when I am away visiting or away car*e*ing for the sick,

I would have been at the hearing but my brother was lying at the point of death for illness contracted while in the Spanish American War. I deeded the above tract of land to Fred C. Fisher on the 23rd day of Dec. 1905 of my own free will and without his knowledge in any way he was in Omaha with cattle and went on to his old home in Maine and did not return until in the spring.

E. MAY INKSTER.

Subscribed and sworn to before me this 20th day of June 1908.

JOHN VIBLE,
Justice of the Peace.

STATE OF WYOMING,
County of Fremont:

Fred C. Fisher, being duly sworn deposes and says that
59 at the time Mrs. Fisher filed her relinquishment and E. May Inkster entered the land it was a bona fide transaction and

not done for the purpose of enabling E. May Inkster to perfect title to the land and then reconvey to either myself or to my wife.

The relinquishment was made by my wife voluntarily, and the entry was made by E. May Inkster in good faith for herself.

The improvements placed on the property by myself and my wife after E. May Inkster entered the land were placed there by me as her agent or representative and for her exclusive use and benefit.

That at no time was there any understanding between us that as quick as E. May Inkster perfected title to the land that it was to be conveyed to my wife or myself.

We were never aware, during the hearing of the contest instituted by William J. Alexander that there was any charge that I or my wife had conspired with E. May Inkster to have her enter the land for the purpose of reconveying it to me and my wife and that when I testified at the hearing before the local office that after E. May Inkster entered the land and before final proof was made that I had expended large sums of money in improving the land, that I intended to state, and had supposed I did so state, that said improvements were made upon the land for the exclusive use and benefit of E. May Inkster, and that had I been apprised of the
60 fact that the contest was being prosecuted upon any ground of collusion and conspiracy with E. May Inkster, I could have completely disproved same, but that not knowing that there was any such charge I did not attempt to disprove same and I was never apprised of the fact that this was one of the questions in the case until I received a copy of the decision of the Commissioner of the General Land Office holding the entry for cancellation upon the ground that I and my wife had colluded and conspired with E. May Inkster to have her enter the land and then assign same to me or my wife, and thereby evade the land and secure title to the property.

FRED C. FISHER.

Subscribed and sworn to before me this 20th day of June 1908.

JOHN VIBLE,
Justice of the Peace.

I, C. Helen Fisher being duly sworn deposes and says that I have read the foregoing affidavit of my husband Fred C. Fisher and know its contents to be absolutely true.

C. HELEN FISHER.

Subscribed and sworn to before me this 20th day of June 1908.

JOHN VIBLE,
Justice of the Peace.

STATE OF WYOMING,
County of Fremont:

George Smith, being first duly sworn on oath state that
61 I am a resident of Fremont Co. Wyo. for 15 years and I live on my ranch less than 3 miles above the E. May Inkster

claim, and know the place thoroughly, my cattle and horses used to run there, and no buildings or improvements.

I have been on the place when Miss Inkster owned it and talked with her men when they were grubbing sage brush, building fence and finishing up her house and barn, during the month of August and September, 1905, I also know that Mrs. Fisher got this land honestly and honorably in every way, I could have had the place as well as she as Perry Westfall, wanted me to take it,

I have no object in making this affidavit by prejudice or selfishness on either side, I have known Alexander the contestant for 17 years ever since he came to this country, I can't see why he wants to take advantage of this property, and get something for nothing—I don't believe in this way of doing business,

Jim Westfall never put any improvements on this land he had something over 12 hundred acres fenced in with his wifes, he also held this body of land for about 13 years he had a homestead and desert that he had no right to whatever, as he told me himself that he used one right in Star Valley, Wyo., and the other in Neb. when his time was up to make final proof (advertised) four days before the date set for proof he left the country and left his family,

62 I was at Com. Strong's a few days latter not as a witness and Perry Westfall was making his filings, This land is desert and has always been, If I understand the law right, and I think I do, it does not matter who does the work, if it is paid for and the law complied with, I never grubbed any sage brush, but I hired it done, and my place is cleared of brush, This section was burned off and hay cut in patches, it was so on my own place, and I further state that Perry Westfall did not improve and reclaim this place, all he ever did was to move an old shack about 12 by 16 that a trapper had used on to it and made one corrall that would perhaps hold 25 head of stock, he never built any ditches nor reclaimed any land, the hay he cut in patches was irrigated by the over flow from his mother's ditches, when Mrs. Fisher got the place I feel very sure it cut from 50 to 60 ton of hay not more, it was thin and cut over a large acreage Mrs. Fisher is the one who built the ditches, Miss Inkster took up the work where Mrs. Fisher left off and completed the house and barn grubbed sage brush built dams and fence and corrals I would say she expended a 1000 dollars or more, I have talked with Miss Inkster's men while they were at grubbing.

I know Mr. Fisher well have done a great deal of business with him he is always fair honest and upright in all he does, kind and unselfish to a fault he is not at home now and I make this aff. because I feel it is just, R. S. Spence, reputation is just the opposite and we all know it in this country.

GEORGE W. SMITH.

63 Subscribed and sworn to before me this 18 day of June 1908.

JOHN VIBLE,
Justice of the Peace.

The said motion for re-review was in words and figures following, omitting the merely formal parts thereof;

I. That it was errer to hold the entry in question for cancellation on the ground that there was collusion and conspiracy between contestee and Fred C. Fisher or his wife, C. Helen Fisher, as neither affidavit of contest or any other paper filed in this proceeding, or any question asked during the trial of the cause before the local officers advised or appraised contestee that this was one of the grounds upon which said contest was being prosecuted.

II. That it was error to hold that the entry was made by contestee at the solicitation and for the exclusive use and benefit of either Fred C. Fisher or his wife C. Helen Fisher, or for their use and benefit directly or indirectly, as such finding was contrary to the facts.

III. That it was error to reverse the findings and decision of the Register and Receiver of the local land office at Evanston, Wyo., because such reversal is contrary to the law and the facts.

IV. That it was errer to sustain the finding and decision
64 of the Honorable Commissioner of the General Land Office rendered herein and appealed from to the Honorable Secretary of the Interior, because such decision was contrary to the law and the facts.

Wherefore contestee respectfully prays that the decision complained of be reconsidered and that the cause be remanded to the local land office with instructions to take further evidence upon the question as to the bona fides of the entry, and the alleged collusion, conspiracy and fraud upon which the decision complained of is based, in order that contestee may refute said charges as she could have so done had she been properly apprised in the first instance that this was one of the grounds of the contest.

Contestee further respectfully requests that in order that her rights may be properly protected and that she may not sustain great, lasting and irreparable injury, that this motion operate as a supersedeas to stay the cancellation of her entry until this cause may be further inquired into by the Department and determined after an opportunity has been given her to establish her rights.

That thereafter and on March 25, 1909, said motion for re-review was denied by the First Assistant Secretary of the Interior in a decision in words and figures following:

This motion is filed by E. May Inkster for reconsideration of the decision of the Department of April 25, 1908, affirming the decision of your office holding for cancellation the desert land entry
65 of E. May Inkster for the S. W. ¼ N. E. ¼, W. /2 S. E. ¼ and S. W. ¼ Sec. 2, and the N. E. ¼, S. W. ¼, Sec. 3, T. 34 N., R. 110 W., Evanston, Wyoming. A motion for review of that decision was denied June 3, 1908. This is a second motion for review.

This entry was held for cancellation for the reason that it is apparent from the testimony that the entry by Miss Inkster was made for the benefit of her cousin, Mrs. C. Helen Fisher, who had previously made entry of the land and who relinquished it after she had learned that she be disqualified from making such entry.

Upon the motion for review the entire record was carefully considered, and as no error was discovered in said decision of April 25, 1908, and no reason then appearing why it should be vacated or modified in any particular, the motion was denied.

As nothing is presented by this motion that was not fully considered and determined by the decisions of April 25 and June 3, 1908, the motion is denied and the papers are herewith transmitted to your office to be placed with the proper files.

That thereafter and on June 24, 1909, the Commissioner of the General Land Office caused to be placed upon the proper tract book in the General Land Office a notation of cancellation of said desert-land entry so made by said E. May Inkster as aforesaid and caused a like notation to be made upon the final certificate issued by the register and receiver upon said entry, as appears by the photographic
66 copy thereof hereinbefore set forth; and on said date, said Commissioner wrote and caused to be transmitted to the register and receiver of the United States land office at Evanston Wyoming, a communication in words and figures following:

WASHINGTON, D. C., *June* 24, 1909.

WM. J. ALEXANDER
v.
E. MAY INKSTER.

Involving D. L. E. No. 1481, made July 20, 1905, by E. May Inkster for S. W. /4 N. E. /4, W. /2 S. E. /4 and S. W. /4 Sec. 2, N. E. /4 S. E. /4 Sec. 3, Tp. 34 N., R. 110 W., F. C. No. 604 issued October 7, 1905.

Motion for Re-review Denied, Entry Canceled and Case Closed.

Register and Receiver, Evanston, Wyoming.

GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of the decision of the Secretary of the Interior, dated March 25, 1909, denying the motion for review of departmental decision of April 25, 1908, affirming office decision of December 12, 1907, holding entry for cancellation.

Said case is accordingly hereby closed. Notify all parties in interest.

The entry is hereby canceled. You will allow contestant 30 days preference right of entry.

Respectfully,

FRED DENNETT,
Commissioner.

That thereafter and on June 28, 1909, this suit was filed, and on the same day the Commissioner of the General Land Office sent the following telegram to the register and receiver at Evanston, Wyoming:
67 Do not note cancellation of final desert entry six-hundred and four, E. May Inkster, by letter June 24. Return letter.

That on July 6, 1909, the Acting Secretary of the Interior caused to be transmitted to said register and receiver a telegram as follows:

Was cancellation final desert entry six hundred four, E. May Inkster, noted before receipt telegram June 28. Wire reply.

That on July 7, 1909, said register and receiver answered said telegram, as follows:

Cancellation final desert entry six hundred four, E. May Inkster, not noted before receipt telegram June 28, nor after.

Supreme Court of the District of Columbia.

SATURDAY, *July* 2, 1910.

The Court resumes its session pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

This cause came on to be heard upon the pleadings and the agreed stipulation of facts filed herein the 25th day of May, 1910, and was argued by counsel and considered by the Court; whereupon, it is by the Court, this 2nd day of July, A. D. 1910, adjudged, ordered and decreed that the bill of complaint be, and it is hereby, dismissed, and that the defendants do recover against the plaintiff the
68 costs of suit to be taxed by the Clerk, and have execution therefor as at law.

THOS. H. ANDERSON, *Justice.*

Memorandum.

Bill Dismissel.

Filed Jul- 2, 1910.

* * * * * * *

The claim of the plaintiff that his entry was canceled without notice or opportunity to be heard upon the ground upon which it was canceled, is not made out. No evidence has been adduced by the plaintiff upon the point, and the agreed stipulation of facts does not, in the judgment of the Court, sustain the plaintiff's claim.

Bill dismissed.

ANDERSON, *J.*

Bond for Appeal to Court of Appeals.

Filed Jul- 25, 1910.

* * * * * * *

Know all men by these presents, That we, Fred C. Fisher, as principal, and American Surety Company of New York, as surety,
69 are held and firmly bound unto the above named Richard A. Ballinger and Fred Dennett in the full sum of One Hundred

dollars to be paid to the said Richard A. Ballinger and Fred Dennett their executors, administrators, successors, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this 12th day of July, in the year of our Lord one thousand Nine hundred and Ten.

Whereas the above-named Fred C. Fisher has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Decree rendered in the above suit by the said Supreme Court of the District of Columbia:

Now, therefore, the condition of this obligation is such, that if the above-named Fred C. Fisher shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

FRED C. FISHER, [SEAL.]
By WEBSTER BALLINGER, [SEAL.]
His Attorney.

[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By BERT NYE, [SEAL.]
Resident Vice President.

Attest:
CLAUDE B. BROWN,
Resident Assistant Secretary.

Sealed and delivered in the presence of—
H. H. SAUM.

Approved the 25th day of July, 1910.
WRIGHT,
Justice, S. C., D. C.

Surety acceptable.
Citation waived.
C. E. WRIGHT,
Att'y for Def't.

70 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Sep. 1, 1910.

* * * * * * *

The Clerk will include the following papers, in the above case, in the transcript of the record on appeal to the Court of Appeals:

1. The bill of complaint.
2. The answer.
3. The replication.

4. The agreed statement of facts.
5. The decision of the Court rendered July 5, 1910.
6. The degree of the Court.
7. Copy of bond and all notations thereon.
8. This order and designation.

WEBSTER BALLINGER,
Attorney for Plaintiff.

Service of foregoing accepted September 1, 1910.

F. W. CLEMENTS,
Attorney for Defendants.

Memorandum.

September 6, 1910.—Time in which to file transcript of record extended from time to time until September 29, 1910.

71 *Supplemental Bill.*

Filed March 24, 1910.

In the Supreme Court of the District of Columbia.

In Equity. No. 28637.

FRED C. FISHER, Plaintiff,
vs.
RICHARD A. BALLINGER, Secretary of the Interior, and FRED DENNETT, Commissioner of the General Land Office, Defendants.

Comes now the plaintiff, by his attorney Webster Ballinger, and by leave of the Court first had and obtained, states as follows:

1. That on or about June 28th, 1909, the plaintiff exhibited his original bill in this Court against the Defendants, Richard A. Ballinger, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office, praying an injunction against said defendants restraining and enjoining them and each of them from cancelling the entry of the land claimed by plaintiff, which entry is more fully described in the original bill and to which reference is hereby made, until plaintiff and his assignor, E. May Inkster, the entrywoman have been served with notice of the exact charges made against said entry, and have been accorded a hearing thereon, and until such charges have been found by the said defendants to be true.

72 2. The plaintiff states that since the filing of the answer of the defendants to said original bill, the officers of the Evanston, Wyoming, Land Office acting under instructions from the defendants have cancelled said entry on the records of said Evanston land office, thus destroying plaintiff's record title to said

land as well as the record title of his assignor, E. May Inkster, before this cause is finally determined by this Honorable Court.

Wherefore, the premises considered, plaintiff prays:

(*a*) That the writ of subpœna issue requiring the defendants to appear and answer the exigencies of this bill (but not under oath, the answer under oath being hereby expressly waived).

(*b*) That a mandatory injunction issue requiring the defendants to reinstate said entry in the local land office at Evanston, Wyoming, and enjoining them and each of them from cancelling said entry when so reinstated until this cause shall be heard and determined by this Court.

(*c*) That he be granted such other and further relief as to this Court may seem just and proper.

WEBSTER BALLINGER,
Attorney for Plaintiff.

WEBSTER BALLINGER,
W. L. FURBERSHAW,
Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

73 Personally appeared before me, the undersigned authority, Webster Ballinger, to me well known, who, upon his oath, deposes and says: that he is the duly authorized attorney for the above-named plaintiff; that plaintiff is a non-resident of the aforesaid District, and that it is not possible to have him personally verify this bill without causing a delay in these proceedings of from two to three weeks; that he has read the above and foregoing petition and that the matters and things therein stated, of his personal knowledge are true and that those stated upon information and belief he believes to be true.

WEBSTER BALLINGER.

Subscribed and sworn to before me this 24th day of March, 1910.

[SEAL.] MORTON J. LUCHS,
Notary Public.

(Endorsed.)

Leave to file the within Supplemental Bill is granted, this 24th day of March, A. D. 1910.

By the Court:

THOS. H. ANDERSON, *Justice.*

74 *Demurrer to Supplemental Bill.*

Filed March 29, 1910.

* * * * * * *

Come now the defendants in the above-entitled cause, by their attorneys, and demur to the supplemental bill of the plaintiff, and for cause of demurrer show that the plaintiff has not in and by said

bill made or stated such a cause as does or ought to entitle him to any such relief as is thereby sought and prayed for from or against these defendants, in this:

1. That the supplemental bill exhibits and shows that the entry of public lands of the United States, cancellation of which plaintiff in his original bill sought to prevent, has in deed and fact been canceled, whereby, as in his original bill set forth, the land in controversy has been restored to the public domain of the United States, is now a part thereof, and is not subject to the demand of plaintiff in any action in any court.

2. That, as set forth in plaintiff's original bill and as shown by the fact averred in his supplemental bill, the legal title to the land in controversy is now completely vested in the United States, which is not a party to this suit nor has in this behalf consented to be sued.

3. That the prayer in said supplemental bill that defendants be required to reinstate said entry presents a demand which this court has no jurisdiction to grant, as the same would require the
75 appropriation of a part of the public domain of the United States in a manner not authorized by law and by a branch of the Government not vested with jurisdiction over the disposal of public lands.

Wherefore, and for divers other good causes of demurrer appearing in said supplemental bill, these defendants demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Solicitors for Defendants.

I, Oscar Lawler, Assistant Attorney-General for the Department of the Interior, say that I am counsel for the defendants herein, and do certify that the foregoing demurrer, in my opinion, is well founded in point of law, and is not interposed for delay.

OSCAR LAWLER.

To Webster Ballinger, W. L. Furbershaw, Solicitors for Plaintiff:

Take notice that the foregoing will be — for hearing on April 1, 1910, at 10 o'clock in the forenoon, or as soon after as said demurrer may be heard.

C. EDW. WRIGHT,
Attorney for Defendants.

Service acknowledged Mar. 29, 1910.
WEBSTER BALLINGER,
By CHAS. POE,
Att'y for Pl'ff.

76 *Motion to Dismiss.*

Filed March 29, 1910.

* * * * * * *

Come now the defendants, by their attorneys, and respectfully present to the court:

That plaintiff's bill sets forth that defendants were threatening to cancel the entry for the land in controversy and that if said cancellation were effected, the said land would revert to the unappropriated public domain of the United States; wherefore plaintiff would be remediless in this form of action.

That on March 4, 1910, the Commissioner of the General Land Office, one of the defendants herein, caused to be sent to the United States Land Office at Evanston, Wyoming, having jurisdiction over the district in which the land in controversy is situated, an order to note cancellation of the said entry immediately, and to notify parties in interest thereof.

That on March 5, 1910, pursuant to said instructions, the register of said land office noted cancellation of said entry upon his records and notified one William J. Alexander of his preference right to enter said land.

That on March 9, 1910, the land in controversy being open to entry under the public-land laws as an unappropriated part of the public domain of the United States, said William J. Alexander filed homestead entry for a part of said land, and one James Redman, on said March 9, made homestead entry of the residue of said land.

77 And it appearing from the premises aforesaid, that plaintiff's entry is canceled, that the land has been completely restored to the public domain, and that the same has been duly entered, under the homestead laws of the United States, by persons who are not parties to this suit, whereby all has been done which this action sought to prevent, the cause now presents merely a moot question for the consideration of this court.

Wherefore, defendants move that the said cause be dismissed and that defendants go hence without day, with their reasonable costs assessed against the plaintiff.

OSCAR LAWLER,
Assistant Attorney-General;
F. W. CLEMENTS,
First Assistant Attorney;
C. EDW. WRIGHT,
Assistant Attorney,
Solicitors for Defendants.

To Webster Ballinger:

Take notice that the foregoing will be for hearing on April 1, 1910, at 10 o'clock in the forenoon, or as soon thereafter as said motion may be heard.

C. EDW. WRIGHT,
Att'y for Def'ts.

Service acknowledged Mar. 29, 1910.

WEBSTER BALLINGER,
By CHAS. POE,
For Pl'ff.

78 *Decree Dismissing Bills.*

Filed April 27, 1910.

* * * * * * *

This cause came on to be heard on defendant's demurrer to plaintiff's supplemental bill and upon defendant's motion to dismiss the cause, and was argued by counsel; and thereupon, upon consideration thereof, it is, this 27th day of April, 1910,

Adjudged, ordered and decreed, that defendant's demurrer aforesaid be and the same is hereby sustained; that defendant's motion aforesaid be and the same is hereby granted; that the prayers of the original and the supplemental bills be and the same are hereby denied; and that the original and supplemental bills be and the same are hereby dismissed; with costs against the plaintiff for which execution shall issue.

By the court:

THOS. H. ANDERSON, *Justice.*

Petition for Rehearing.

Filed April 27, 1910.

* * * * * * *

To the Honorable the Justices of the Supreme Court of the District of Columbia, holding an Equity Court:

The petition of Fred C. Fisher respectfully shows:

79 1. That he is a citizen of the United States, and a resident of the State of Wyoming, and is the plaintiff in the above-entitled cause.

2. That he is much aggrieved by the decree made in the above-entitled cause on the 27th day of April, 1910, whereby the demurrer of the defendants to the supplemental bill was sustained, and the defendants' motion to dismiss the cause was granted; the Court thereby adjudging and decreeing that the cancellation of the entry by the Secretary during the pendency of this suit left the plaintiff remediless and presented a moot question for the consideration of the Court, and that the Court is now without jurisdiction to require,

by mandatory injunction, as prayed for, the reinstatement of the entry, and to afford plaintiff the relief prayed in the original bill.

3. That he desires a rehearing of said cause for the following reasons:

(*a*) Because the supplemental bill expressly prayed for a mandatory injunction requiring the defendants to reinstate the entry and put the plaintiff in the same position he occupied at the institution of this suit, which relief was clearly in the power of the Court to grant, but which question was never presented to or considered by the Court;

(*b*) Because the decision is in conflict with controlling decisions of the courts, which decisions were overlooked by this Court.

Wherefore, the premises considered, petitioner prays:

1st. That he may be granted a rehearing of the above-
80 entitled cause; and,

2nd. That he may be granted such other and further relief as his case may require and this Court may be competent to decree.

WEBSTER BALLINGER,
Attorney for Plaintiff.

F.

To Messrs. Oscar Lawler, F. W. Clements and C. E. Wright, Attorneys for the Defendants.

GENTLEMEN: Take notice that the foregoing will be for hearing on Friday, May 6th, 1910, at 10:00 o'clock, A. M., or as soon thereafter as counsel can be heard.

WEBSTER BALLINGER,
Attorney for Plaintiff.

F.

Service of copy of the foregoing petition accepted this 27th day of April, 1910.

C. E. WRIGHT,
Of Counsel for Defendants.

81 *Order Vacating Decree of April* 27, 1910.

Filed May 20, 1910.

* * * * * * *

This cause came on to be heard on the plaintiff's petition for rehearing, and was argued by counsel; thereupon, upon consideration thereof, it is, by the Court, this 20th day of May, A. D. 1910,

Adjudged, ordered, and decreed, that the decree heretofore made and entered herein on the 27th day of April, A. D. 1910, be, and the same is, hereby vacated and set aside; that the defendants' demurrer and motion to dismiss the cause heretofore filed herein shall stand undisposed of until the final hearing of this cause; and that the plaintiff shall take and file his testimony in this cause on or before May 27th, A. D. 1910.

By the Court,

THOS. H. ANDERSON, *Justice.*

Appellees' Designation of Record.

Filed September 2, 1910.

* * * * * * *

In preparing the transcript of the record in the above entitled case on appeal to the Court of Appeals of the District of Columbia, in addition to the papers mentioned in the plaintiff's designation the clerk will please include the following:

82 A. The supplemental bill filed March 24, 1910.

B. The demurrer thereto filed March 29, 1910.

C. The motion to dismiss the proceedings filed by defendants March 29, 1910.

D. The decree dismissing the cause dated April 27, 1910.

E. The petition for rehearing filed by plaintiff April 27, 1910.

F. The order vacating decree of April 27, 1910, dated May 20, 1910.

G. This designation.

OSCAR LAWLER,
F. W. CLEMENTS &
C. E. WRIGHT,
Attorneys for Defendants.

Service of foregoing accepted Sep. 2, 1910.
WEBSTER BALLINGER,
Attorney for Plaintiff.

83 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 82, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 28637 in Equity, wherein Fred C. Fisher is Complainant and Richard A. Ballinger, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of September, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2229. Fred C. Fisher, appellant, vs. Richard A. Ballinger, Sec'y, &c., et al. Court of Appeals, District of Columbia. Filed Sep. 26, 1910. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1910.

No. 2229.

FRED C. FISHER, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, AND FRED DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPELLANT'S STATEMENT.

WEBSTER BALLINGER,
Counsel for Appellant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1910.

No. 2229.

FRED C. FISHER, APPELLANT,

vs.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, AND FRED DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE.

APPELLANT'S STATEMENT.

The plaintiff and defendant in the court below, and appellant and appellee in this court, will be referred to hereinafter as appellant and appellee, respectively.

1. The Appeal.

This appeal (Rec., p. 36) seeks to reverse the decree of the Supreme Court of the District of Columbia dismissing appellant's bill.

2. General Nature of the Case.

On June 25, 1909, appellant filed his bill in the Supreme Court of the District of Columbia (id., pp. 1 to 5, inclusive), alleging that on the 20th day of July, 1905, the land in controversy was regularly entered by E. May Inkster under the desert land laws of the United

States; that the entrywoman complied with all the requirements of the law, paid the Government the sum of $400, the purchase price, submitted her final proof, which was found by the local officers to be regular, and received from them on October 7, 1905, a final certificate which appears in the record, page 19. On December 23, 1905, for valuable consideration she conveyed the land to appellant by good and sufficient warranty deed. On May 7, 1906, and before the issuance of the patent, one Wm. J. Alexander, filed in the local land office an affidavit of contest against said entry, alleging as grounds therefor that at the time the land was entered by E. May Inkster it was not desert land, but had been theretofore fully reclaimed; that the entrywoman had done nothing to reclaim said land, had not constructed any ditches or in any way improved the same; that the said entry was therefore void (id., Bill, p. 2; Contest Affidavit, p. 11). Thereafter a hearing was had upon said contest, and on July 8, 1907, the register and receiver rendered a joint decision (id., Bill, p. 3; Decision, pp. 11, 12) dismissing the contest, sustaining the entry and recommending that it pass to patent. From said decision appeal was taken by the contestant to the Commissioner of the General Land Office, who, on December 12, 1907, rendered a decision reversing the finding of the local officers and holding the entry for cancellation (id., Bill, p. 3; Decision, pp. 10, 11, 12). From this decision an appeal was taken to the Secretary of the Interior, who, on April 25, 1908, affirmed the decision of the Commissioner, the grounds of said appeal and said decision appearing in the record (Bill, p. 3; Decision, pp. 14, 15, 16). Thereafter a motion for review of said decision was filed and denied by the Secretary, said motion and decision appearing in the record (Bill, pp. 3, 4; Decision, pp. 28 to 31, inclusive). Thereafter a motion for rereview was filed, supported by the affidavits of E. May

Inkster, Fred C. Fisher, C. Helen Fisher, and George W. Smith (id., pp. 31, 32, 33), and on March 25, 1909, denied by the Secretary, said motion and decision appearing in the record, pages 34 and 35.

Appellant in his bill alleges (id., pp. 4, 5) that:

> "The question of the expenditures having been made by C. Helen Fisher or complainant, as her agent or representative, was never raised before the local land office; and as the contest affidavit did not allege or even intimate conspiracy or connivance between the complainant or his wife, C. Helen Fisher, and the entrywoman, E. May Inkster, and as no questions were asked during the hearing of said cause by any person that intimated to them that this was one of the grounds upon which the contest was instituted or was being prosecuted that no evidence was introduced establishing the fact that any expenditures made by C. Helen Fisher or complainant were made for her exclusive use and by them as her agents or representatives, which they could have so done had they been apprised of the fact that this was the ground upon which said contest was to be decided."

The relief prayed (id., p. 5) was:

> "That upon a preliminary hearing an order issue out of this court enjoining and restraining the respondents, their officers, agents, or employees from canceling said entry until complainant and E. May Inkster have been served with notice of the exact charges made against said entry and intended to be prosecuted by some person, or officer or agent of the Department of the Interior, and until such charges have been found to be true at a hearing had in the regular and ordinary course of proceedings before said department; that upon final hearing of this cause said injunction be made perpetual."

September 3, 1909, answer of the defendants was filed. By agreement the case was submitted upon a stipulation of facts (Rec., pp. 17 to 36, inclusive). July 2, 1910 (id., p. 36), the court entered decree dismissing appellant's bill, from which this appeal was taken.

Assignment of Error.

The court erred (id., p. 36) in holding that:

1. "The claim of the plaintiff that his entry was canceled without notice or opportunity to be heard upon the ground upon which it was canceled, is not made out. No evidence has been adduced by the plaintiff upon the point, and the agreed stipulation of facts does not, in the judgment of the court, sustain the plaintiff's claim."

2. In denying the relief prayed and dismissing the bill.

ARGUMENT.

If the holding of the court below, that the appellant was afforded a hearing upon the precise grounds upon which the entry was held for cancellation by the Secretary is correct, the decree should be affirmed; if said court was in error, the decree should be reversed.

The contest affidavit (Stipulation of Facts, Rec., p. 21) alleged:

> "That said land is not desert in character and at the time of entry was, and had been for a number of years, thoroughly reclaimed and was then producing a paying crop of hay. That the said E. May Inkster has done nothing to reclaim the said land, had made no ditches or in any way improved the same.
>
> "That nearly fifteen years ago one James Westfall settled upon the said land and reclaimed the

same by constructing ditches and fencing the same and by a system of irrigation reclaimed the whole tract.

"That subsequent to this the said Westfall, caused the same to be entered by his son Parry Westfall, as a desert entry. Later, he, for a valuable consideration, assigned the said land to Mrs. Cordelia Fisher, who, on discovery that she had more land than she could hold, relinquished the same, and E. May Inkster, her niece, entered it as a desert claim, on July 20th, 1905, and in about two months later made final proof on the same, stating that she had reclaimed the same and complied with the law. That affiant desires that these facts may be established and the said entry canceled, that he may be enabled to make a homestead entry on a part of said land, and establish a home thereon."

The entry was held for cancellation by the Secretary (id., pp. 30, 31), because:

"The decision of your office holding this entry for cancellation was sustained by the department for the reason that the testimony led to the conclusion that the entry was made solely for the benefit and in the interest of Mrs. Cordelia Helen Fisher, who was not qualified to complete the entries of her assignors, Westfall and Allen, and that the entry by this claimant was used as a subterfuge to accomplish indirectly what could not be done directly. . . .

"That is the view the department took of the case, and it is immaterial whether it was charged in the contest or not. The Government will investigate for itself every question, in order that no portion of the public land shall be disposed of to a person not entitled to it."

In deciding the motion for review the Secretary (id., p. 34) says:

"This entry was held for cancellation for the reason that it is apparent from the testimony that the entry by Miss Inkster was made for the

> benefit of her cousin, Mrs. C. Helen Fisher, who had previously made entry of the land and who relinquished it after she had learned that she be disqualified from making such entry."

Thus the grounds of contest as stated in the affidavit, and upon which issues at the hearing were joined were: that the land at the time it was entered by E. May Inkster was not desert land, but had been fully reclaimed, while the entry was held for cancellation (id., p. 34), because—

> "it is apparent from the testimony that the entry by Miss Inkster was made for the benefit of her cousin, Mrs. C. Helen Fisher, who had previously made entry of the land and who relinquished it after she had learned that she be disqualified from making such entry."

In any judicial or quasi-judicial proceedings in this country affecting property rights the finding, judgment or decree, must conform to the matters put in issue by the pleadings; otherwise it is void. The Rules of Practice in cases before the United States district land offices, the General Land Office and the Department of the Interior, approved July 15, 1901, and which have continuously remained in force, provide:

> Rule 2. "In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, *fully setting forth the facts which constitute the grounds of contest.*"

The department has, until the case now before the court was passed upon by the Secretary, uniformly held that the judgment, as in actions at law, must conform to the matters put in issue by the contest affidavit, and that testimony upon matters not so put in issue is wholly foreign to the case and should not be considered.

In the leading case of Schelter *vs.* Off, 1 L. D., 113, Secretary Kirkwood said:

> "The affidavit of contest alleges that Off 'has wholly abandoned said tract, and that said tract is not cultivated by said party as required by law.' As these were the sole charges made by Schelter, Off was required to answer these only, and there could properly be no other issues between the parties for trial. Testimony upon other matters not incident thereto was wholly foreign to the case, and should not have been considered, either by the local officers or by your office. In contests under the land laws proofs should be confined to allegations, as in trials at law, and judgment be rendered on the questions raised by the record only. A large portion of the testimony in this case, however, had reference to the character of the land, and whether it was subject to a timber-culture entry. This was a question impertinent to the issue, and was admitted against the objections of Off's counsel. . . .
>
> "Without, therefore, now deciding other questions raised by the appeal, I direct that a further hearing be ordered touching the character of said land, unless Off consents that, in lieu thereof, the present testimony may be considered in the adjudication of that question."

In Shull *vs.* McCormick, 1 L. D., 470, the substance of the decision is set out in the syllabus, which is fully sustained by the decision, as follows:

> "Testimony upon matters not incident to the charges upon which the hearing was ordered is wholly foreign to the case and should not be considered.
>
> "Evidence in contests under the land laws must be confined to the allegations, as in trials at law, and judgment be rendered on the issues raised by the record only."

Of course in trials at law the judgment must conform to the matter put in issue by the pleadings. Such is also the rule in proceedings in chancery. In the leading case of Crockett *vs.* Lee, 7 Wheat, at 523, 5 L. Ed., at 514, it was urged by appellant that although the grounds upon which the relief was then being sought were not put in issue by the pleadings, still they were shown by the testimony and it would be—

> "monstrous, if after the parties had gone to trial on the validity of the entry, and had directed all their testimony in the circuit court to that point, their rights should be made to depend in the appellate court *on a mere defect in the pleadings*, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case."

Chief Justice Marshall, speaking for the court upon this point, said:

> "The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery—rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We can not dispense with it in this case."

In Reynolds *vs.* Stockton, 140 U. S., 254, 35 L. Ed., at 468, first column, the court said:

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted." . . . "Whatever may be the rule where substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue."

Where Fraud is Relied Upon in a Contest Proceeding, it Must be Clearly and Specifically Charged in the Contest Affidavit.

In Sims *vs.* Busse, 4 L. D., 369, the syllabus states the substance of the decision as follows:

> "Where fraud or illegality is relied upon as the ground of contest, the allegations thereof should be specifically made."

In the case at bar there was no allegation in the contest affidavit that the entry had been made by E. May Inkster for the benefit of the Fishers. As this was not in issue, the cancellation of the entry, based exclusively upon this ground, was a void proceeding. There is no question as to the established rule governing such a case. If the entry was made by Miss Inkster for the benefit of the Fishers, it was a fraudulent entry; but this question must have been put in issue by the contest affidavit as one of the grounds of contest, and if this was not done

any testimony offered upon this point was not admissible, and any finding, judgment, or decree of the Secretary was mere obiter dictum, and not binding upon the appellant or his assignor, Miss Inkster. A finding, judgment, or decree, based upon fraud, must be supported by clear, convincing, and unambiguous proof submitted responsive to the issues joined. In Voorhees *vs.* Bonestead, 84 U. S., 16, 21 L. Ed., commencing at the bottom of page 270, the court says:

> "Accusations of fraud may well be dismissed, as nothing of the kind is alleged in the bill of complaint, and it is well settled law that affirmative relief will not be granted in equity upon the ground of fraud unless it is made a distinct allegation in the bill, so that it may be put in issue by the pleadings." Citing several authorities.

In U. S. *vs.* Hancock, 133 U. S., 193, 33 L. Ed., at 604, the court says:

> "These matters, together with the failure to publish notice in the nearest paper, are all the evidences of fraud in the transaction. Not only are they not 'the clear, convincing and unambiguous proofs of fraud required to set aside a patent, as declared by this court in the case of Colorado Coal & Iron Co. *vs.* United States, 123 U. S., 317 (31 L.Ed., 186), but they all combined create nothing more than a suspicion. They may leave a doubt, but they do not bring the assurance of certain wrong."

See, also, Colorado Coal and Iron Co. *vs.* U. S., 31 L. Ed., commencing on page 186. This case is directly in point.

Reference is made in the decision of the Commissioner (id., p. 13), and in the decision of the Secretary (id., p. 16), to the fact that the final proof was submitted before Fred C. Fisher, the appellant, and great stress is laid

upon the fact that in said papers there appeared erasures and alterations. As Fred C. Fisher was a United States Commissioner and duly authorized under the law to take final proof, the mere fact that this proof was submitted before him is in itself no evidence of fraud. The papers offered in evidence at the hearing were not then objected to by counsel and no question as to any erasures or alterations was then raised. Had any question been then raised as to their admissibilty in evidence the entrywoman and her grantee, the appellant, would have been afforded an opportunity to have explained any alleged erasures or alterations. After the hearing was closed both the contestant and the Government were estopped from questioning in that proceeding the regularity and conclusiveness of the papers offered in evidence, and about which so much is said in the decisions of the department. But, if these alleged erasures and alterations could be considered by the Secretary on appeal, and without affording the entrywoman or her assignee an opportunity to explain them, they are not sufficient to support the finding of the department, because at most they can but create suspicion, that does not amount to certain wrong. Therefore, they can play no part in the determination of this case. The entrywoman having submitted her proof, which was approved by the local officers, having paid the Government the purchase price for the land and having received a final certificate (id., p. 19), certifying "that on presentation of this certificate to the Commissioner of the General Land Office, the said E. May Inkster shall be entitled to receive a patent for the tract of land above described," could legally convey title to the land.

As held in Cornelius *vs.* Kessel, 128 U. S., 456–63, 32 L. Ed., 482, at 483, and Orchard *vs.* Alexander, 157 U. S., 372, 39 L. Ed., 737, at 741, appellant had a property

right in this land "of which he could not be arbitrarily dispossessed," and as held in Garfield *vs.* U. S. ex rel. Goldsby, 211 U. S., 249:

> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law."

Appellant, having been arbitrarily denied a hearing by the department, and the entry having been canceled without affording either him or his assignor an opportunity to be heard, has been deprived of his property without due process of law.

The entry was intact in the local office when this suit was filed (id., pp. 35, 36), and was not canceled until March 5, 1910 (id., p. 41). Therefore, when this suit was filed the court had jurisdiction of the subject-matter, and that jurisdiction still remains.

Jurisdiction.

It is unfortunate that a citizen of the United States should be compelled to appeal to the courts to protect him against so flagrant an abuse of power by the administrative officers of the Government. The appellees in the case at bar can not shield themselves and defend their action by the plea that this is a suit against the Government, which can only be sued with its consent. The officers of the Government are the agents of the law. They can only act and speak by law. Whatever they do must be lawful. When appellees struck down the rights of appellant without affording him or his assignor an opportunity to be heard, they did not act for the Government of the United States, but their acts were the mere wrong and trespass of individuals who falsely

spoke and acted in its name. In Marbury *vs.* Madison, 1 Cranch, 152, 2 L. Ed., 60, 69, Mr. Chief Justice Marshall said:

> "This brings us to the second inquiry, which is: 2d. If he has a right, and that right has been violated, do the laws of this country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of Government is to afford that protection. . . . If one of the heads of departments commits any illegal acts under color of his office, by which an individual sustains an injury, it can not be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding and being compelled to obey the judgment of the law."

In Central of Georgia R. Co. *vs.* Railroad Commission of Alabama, 161 Fed. Rep., 959, the court said:

> "Within the scope of their delegated authority the acts of State officers are the States' acts. When they transgress the limits of their authority, it is not the State which acts, 'for as it can act and speak only by law, whatever it does say and do must be lawful,' but is 'the mere wrong and trespass of individuals, who falsely speak and act in its name.' Poindexter *vs.* Greenhowe, 114 U.S., 290, 5 Supt. Ct., 914, 29 L. Ed., 185. If the acts of officers of these departments, outside of the scope of the power entrusted can not be effectively stayed when necessary to save the liberty and property of the citizen from illegal invasion under color of State laws, because such proceedings are suits against the State, which the citizen can not maintain, there is an end of real constitutional government and liberty, and the enthronement in their stead of official absolution. The Constitution deals with substances, not shadows. Its inhibition was levelled at things, not the name."

In Cunningham *vs.* Ashley, 14 Howard, 377, 388, 14 L. Ed., 462–467, the court said:

> "The officers of the Government are the agents of the law. They can not act beyond its provisions, nor make compromises not sanctioned by it."

Counsel for appellant respectfully submits that the decree of the court below should be reversed, that the relief prayed for should be granted, and that all proper costs of this appeal should be assessed against the appellees.

Respectfully submitted.

WEBSTER BALLINGER,
Counsel for Appellant.

In the Court of Appeals of the District of Columbia.

OCTOBER TERM, 1910.

No. 2229.

FRED C. FISHER, APPELLANT,

v.

RICHARD A. BALLINGER, SECRETARY OF THE INTERIOR, ET AL.

BRIEF FOR APPELLEE.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS,
First Assistant Attorney.
C. EDWARD WRIGHT,
Assistant Attorney.
For the Appellee.

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BRIEF FOR APPELLEES.

It is our duty, at the outset, to inform your honors that naught but a moot case is presented by this appeal. The appellant prayed for an injunction against the cancellation of the desert-land entry involved in this case. (Record, p. 5.) The answer (record, p. 8) shows that even prior to the filing of the bill, the entry was regularly cancelled on the records of the General Land Office. The stipulation of facts sustains the averment. (Record, p. 35.) According to the practice of the land department, the act of actual cancellation at the General Land Office is followed by the notation of that fact upon the records of the local land office of the district within which the land is situate. This has the effect of advising the world that the land is once again open to entry under the public-land laws. No third person, including a successful contestant of a previous entry, can make entry until after this notation has been made. But so far as the discredited entryman and the Government are concerned, the cancellation of the entry at the General Land Office is all sufficient.

In addition to that, however, in this particular case, after the court below had refused to grant the injunction sought,

the Government directed the local land officers to note the cancellation of the entry and to permit the contestant, Alexander, to enter a portion of the land under the homestead laws. He could not enter the entire tract; only half of it. Prior to the perfection of this appeal the contestant and another person made homestead entries of all the land involved in this litigation.

The entry of E. May Inkster has thus been formally and finally canceled. The land involved has been appropriated by qualified persons not parties to this suit. If she or the appellant has been wronged, either has a remedy in a court of the vicinage in a suit against the entrymen whose rights are now recognized by that department of the Government within whose jurisdiction the settlement of claims to the public land, so long as the legal title remains in the United States, is vested.

But if the court is willing to consider the case presented by the record and by appellant's brief as if it were not the moot case that it is, we invite your honors' attention to the assignment of error on page 4 of his brief. His sole ground for quarrel with the decision of the court below presents a question of fact and nothing else. The chancellor before whom the case was tried very generously and patiently ignored the objections founded on legal propositions to the consideration of the bill and tried the case on the facts afforded by the stipulation. (Record, pp. 17–36.) He found the facts to be contrary to appellant's contention. He found that appellant's claim that the entry was canceled without notice or opportunity to be heard upon the ground upon which it was canceled was not made out.

As near as we can make it, appellant's grievance appears to be that the entry was contested by an individual on one ground and cancelled by the Government on another ground which was disclosed during the course of the hearing by the testimony of the appellant and his wife. It does not appear that there were no facts justifying the conclusion reached by the appellees. Appellant cites certain cases in his brief which go to the forming of issues in proceedings *inter partes*. He forgets one salient point: The Government primarily is concerned with seeing that the laws it administers are obeyed; very frequently its attention is invited by so-called con-

testants to alleged violations of the law by entrymen; these contestants select their own grounds for attack, which may be good or bad—that being for the Land Department to determine. But the trial of the case may disclose many things not suggested by the complaint. A contestant may stand on the proposition that the entryman has not complied with the law in the matter of residence or cultivation; the evidence may show to the Government that whether that be true or not, the entryman was disqualified to make the entry—noncitizenship, former exercise of the homestead right, etc. Can it be urged that the Land Department must promote the enterprise of a disqualified person simply because a contestant has not incorporated the whole story of the Government's wrongs in his bill of complaint?

Now, the record shows the facts in this case to be these: That Inkster, who made the entry, was notified of the contest and failed to appear; that Fisher, the appellant and the only party interested, appeared and took part in the trial; that the evidence disclosed facts fatal to the integrity of the entry, the testimony of Mrs. Fisher and of appellant showing that the entry nominally made by Miss Inkster was made in reality for the appellant. Furthermore, it shows that the land at the time Miss Inkster made the entry under the desert-land law was not desert land, but had been reclaimed by appellant, and that Miss Inkster never performed or contributed to the performance of a single act toward the reclamation of the land. Any one of these facts is fatal to the legality of the Inkster entry. All were known to the appellant before whom, as United States commissioner, Miss Inkster had executed her perjured proofs. Appellant is now before this court as the grantee of Miss Inkster's "equitable" title, seeking to acquire land in contravention of the public-land laws and in fraud of the United States. He comes not into equity with clean hands.

The jurisdiction of the court does not attach until after the legal title to the land has passed out of the Government. Whether the Inkster entry could be passed to patent presented a question of fact, which it was the function of the appellee to determine. He had determined the facts adversely, and that act is conclusive. (*Johnson* v. *Towsley*, 13 Wall., 72; *Brown* v. *Hitchcock*, 173 U. S., 433; *Knight* v. *U. S. Land Asso.*, 142 U. S., 161.)

No court has jurisdiction to interfere with the Land Department in the cancellation of an entry so long as the legal title is yet in the United States. Said the Supreme Court in *Gaines* v. *Thompson* (7 Wall., 347):

> The act of the Secretary of the Interior and Commissioner of the Land Office in cancelling an entry for land is not a ministerial duty, but is a matter resting in the judgment and discretion of those officers as representing the executive department. Accordingly the court will not interfere by injunction more than by mandamus to control it.

The appellant took by his deed merely what the entry-woman had acquired. The contest was against her, and she did not appear at the trial and except to any of the evidence adduced; nor did appellant, who did appear, except to the evidence. All that went into the record was competent for the appellee to consider. In performing the last act, by which title flows from the United States to an individual, it is proper for the head of the Land Department to take into consideration any fact in the record, whether formally or informally brought to his attention. His obligation to the Government is to see that the requirements of the law are fulfilled; he must not sit idly by and let land go which it would be his immediate duty to seek to recover through the courts. (*Knight* v. *Land Association*, *supra*.)

As to the dismissal of appeals on the ground that a moot question only is presented, we invite attention to *Cardozo* v. *Baird* (30 App. D. C., 86); *U. S. ex rel. Gannon* v. *Georgetown College* (28 App. D. C., 91); *Jones* v. *Montague* (194 U. S., 147); *Wilson* v. *Shaw* (204 U. S., 24); *Secretary* v. *Prewitt* (200 U. S., 446).

Respectfully submitted.

OSCAR LAWLER,
Assistant Attorney General.
F. W. CLEMENTS,
First Assistant Attorney.
C. E. WRIGHT,
Assistant Attorney.
For the appellee.

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IN THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

OCTOBER TERM, 1910.

No. 2229.

FRED C. FISHER, APPELLANT,

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R. A. BALLINGER, SECRETARY OF THE INTERIOR ET AL.

SUPPLEMENTAL BRIEF FOR APPELLEES.

OSCAR LAWLER,
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Assistant Attorney for the Appellees.

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SUPPLEMENTAL BRIEF FOR APPELLEES.

The prayer in appellants' bill, which is directed not only against the Secretary of the Interior, but the Commissioner of the General Land Office, seeks to produce the effect, if granted, of reversing a judgment already rendered and to remand the case for trial precisely as if this court had jurisdiction over the Land Department in an appellate capacity.

I.

The local land officers, who have no authority to render judgment, but merely to recommend action to the Commissioner of the General Land Office, passed upon two propositions—the character of the land and the *bona fides* of the entryman, finding in favor of the entry in both respects. (Record, p. 11.) Whereupon the contestant appealed to the Commissioner of the General Land Office, who refused to follow the

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I.

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recommendation of the local land officers. The fact that the land was nondesert was found by the commissioner, one of the defendants in this case, and *the entry was ordered canceled upon that ground alone.* (Record, pp. 13, 14.) Under the rules, appellant had a right to appeal to the secretary, just as a litigant has a right to appeal from the judgment of the Supreme Court of the District to this court. The appeal presented to the secretary the question whether or not the judgment of the commissioner, ordering the cancellation of the entry, was free from reversible error. The secretary decided: He found (Record, p. 17) that the evidence sustained the charge as to the character of the land. He then went on to say that there was another significant fact connected with entry, the evidence suggesting the collusive character of the entry, which had been adverted to in the decision of the Commissioner of the General Land Office. Then comes the conclusion of the secretary: "Your decision is affirmed." (Record, p. 16.)

Motion for review being filed, addressed mainly to the matter of collusion, the secretary did say that the decision of the General Land Office was sustained by reason of the fact developed at the trial that the entryman was really acting in the interest of the Fishers.

But the *judgment* was that pronounced by the commissioner, which was affirmed by the secretary. Things in the record appealed to him and he said things in his *decision* which form the basis of appellant's complaint.

Suppose, then, this court reverses the decision of the court below and that an order issues as prayed in appellant's bill, of what avail would it be? If the secretary's decision in the motion for review be vacated and if his decision on the appeal from the commissioner be reformed so as to eliminate all reference to the collusive nature of the entry, what remains? The commissioner's decision and judgment that the entry be canceled on the ground that the land was nondesert in character at the time of the Inkster entry, the finding of the secretary that this was the fact, and the secretary's judgment affirming the judgment of the commissioner. It is conceded that the character of the land was in issue and that due process of law was accorded all parties in respect to that charge, and there is no suggestion that the record is ample to sustain that charge.

How, then, we repeat, would the decision of this court in favor of appellant avail him? An adverse unimpeachable judgment would remain.

II.

But adopting the theory of the appellants' bill and dropping temporarily from sight the judgment of the commissioner, and assuming that the judgment of the Secretary does not conform to the pleadings (although it certainly does to the facts adduced—and the facts not only are those found from the testimony of the Fishers but from the intrinsic evidence afforded by the entry papers themselves), the judgment is not necessarily void, but erroneous and there-

fore voidable. That is, the situation is one where ordinarily the error below will be corrected on appeal. The judgment would not be subject to collateral attack, but its validity must be tested directly by the aggrieved party.

The question which we understood occurred to your honors is this: While it is true that such a judgment in ordinary suits and before regular courts is not impeachable in a collateral proceeding, is the rule different where, as in the case at bar, there is no right of appeal from the land department to the courts?

We answer yes and no.

The rule is different under such circumstances as the Supreme Court had in mind when it decided *Johnson* v. *Towsley* (13 Wall., 72). While careful to guard against any invasion of the functions confided to the Interior Department by law in reference to proceedings pending before that department, so long as the title to the land involved remains in the United States, the court said (p. 87):

> * * * it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the Government*, and the question became one of *private right*, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and

> powers of each, but are essential to the ends of justice and to a sound administration of the law.

That is to say, if, after the Land Department has enforced its judgment in a contest affecting public land and the rights of certain litigants thereto, and has issued patent in accordance with its judgment, by which issue the legal title to the land is no longer in the United States, the unsuccessful party to that contest proceeding brings suit against the successful patentee with the purpose of charging a trust upon the land so patented, then, perforce, the validity of the judgment of the Land Department is attacked; and that in a collateral proceeding to which the United States is not a party. No judgment between these private litigants can be rendered by the court without inquiry into the soundness, the validity, of the departmental judgment awarding the land to the defendant.

Here, and here only, is the exception to the rule that a voidable judgment rendered by a court of jurisdiction over the subject matter (and no such jurisdictional question is raised in this case) may not be collaterally attacked; and this is so solely and simply because the judgment of the Land Department may not be attacked directly or indirectly so long as the legal title to the land involved resides in the Federal Government. As the court said in *Johnson* v. *Towsley*, "it (the court) has frequently and firmly refused to interfere with them (the officers of the Land Department) in the discharge of their

duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision."

It matters not whether the head of that department decided right or wrong; it matters not that a writ of error or appeal may not lie to correct his judgment. Having jurisdiction over the subject matter, his judgment is conclusive so long as the United States is an interested party by retaining the legal title to the land. It is not subject to collateral attack until "after the title had passed from the Government and the question became one of private right." The point is brought out in *United States ex rel. Riverside Oil Co.* v. *Hitchcock* (190 U. S., 316), where on pages 324, 325, the court says:

> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the secretary. Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within

> their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. *Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the secretary, furnish any foundation for the claim that mandamus may therefore be awarded.* The responsibility as well as the power rests with the secretary, uncontrolled by the courts. (Italics are ours.)

See also *Beard* v. *Federy*, 3 Wall., 478; *Lynch* v. *DeBarnal*, 9 Wall., 315.

Within the limits of its jurisdiction over the subject-matter of a controversy affecting land to which the United States still retains the legal title, the power of the Land Department is supreme. Courts may not intervene beyond exercising its control over ministerial acts. If the act sought to be controlled sounds in the exercise of judgment and discretion, the courts must pause until the act is consummated and a ques-

tion of private right *inter partes*, the United States dropping out, is presented.

Such is the situation in this case. If the appellant be seriously aggrieved, and if the Land Department has erred in canceling the entry, and if the contestant be not entitled to the land, although we have permitted him to make entry—the only entry now of record—let the appellant, following *Johnson* v. *Towsley*, seek his remedy at the proper time, in the proper forum, and against the proper party.

III.

Of course we do not concede that the appellant did not have his day in court on either of the propositions that is fatal to the integrity of his claim. He admits that he went to trial apprised of the charge against the *character* of the *land*. He is complaining that he did not know that he was charged with collusion with the entryman and that he has had no opportunity to present testimony on that point. Well, neither did the Government nor the contestant (apparently) know about the *character* of the *entry* so far as the good faith of Miss Inkster is concerned until the appellant and his wife voluntarily offered at the trial evidence, which when viewed in the light of the papers and proofs submitted by Miss Inkster (all executed before the appellant in his official capacity, except the deed which was executed before Mrs. Fisher as notary—this being strictly a family affair)—abundantly showed that the entry was not made in the interest of the entryman.

This is not a case where the party went to trial on certain charges which he had prepared himself to meet; there to be confronted with other charges not in the pleadings supported by evidence he came unprepared to rebut. He was not taken by surprise. The proceeding was a triangular affair, so to speak. He was interested; Alexander was interested; the United States was interested. The United States owned the land. It had no interest in anything else. It was of no consequence to the Government whether Alexander or Fisher got the land, provided that neither obtained it in contravention of the law. Alexander brought charges against the entry which Fisher defended. And in his defense, he disclosed certain facts which were fatal to the entry so far as the United States was concerned, whether what Alexander charged was true or not.

The case is not unlike that presented in *Abee* v. *San Antonio Brewing Co.* (78 S. W., 973), decided by the Court of Civil Appeals of Texas in 1906. That was a suit to restrain the sale of certain land on a judgment against plaintiff's former husband, she claiming that it was her homestead. A third party intervened. On the trial the intervener admitted that the judgment had been paid in full before his intervention. While plaintiff had not pleaded this payment as a ground of relief, nevertheless the court held that she was entitled to judgment on such admission. The court said:

> The question of homestead is of no importance in view of the fact that the execution

> sought to be restrained had been issued under a judgment that had been fully paid off and discharged. It does not matter that Mrs. Jonas had not pleaded payment of this judgment. Appellant had set up a right to have the land held subject to a judgment lien, and in order to establish his claim he was compelled to prove that he had an active, valid judgment. When he admitted that the judgment had been discharged, he admitted himself out of court.

In the case at bar Alexander attacked Inkster's entry on a certain ground. Fisher, who claimed as transferee, appeared as a—*the*—party in interest and testified. He and his witnesses furnished evidence, while testifying, that made it unimportant whether the land was desert land or nondesert at the time of Inkster's entry; for if Inkster made her entry in the interest of Fisher the entry was void and must have been canceled.

At this point we desire to invite the court's attention to the disingenuous character of the counsel's quotation from *Reynolds* v. *Stockton* (140 U. S., 254), on page 9 of his brief. Three periods therein indicate an omission. The part omitted is as follows:

> Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so

> often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings.

IV.

Appellant wants a retrial so as to present evidence on a charge that the entry was made collusively. Not appreciating the effect of his testimony at the hearing, while he was on the stand, he now wants another trial in the hope of disproving what he then virtually admitted. The Government is under no obligation to meet him on that charge; we may eliminate all reference to collusion from our decisions and confine the judgment to the proposition that the land was nondesert and therefore not subject to the Inkster entry, a fact already found by the Commissioner of the General Land Office, who held the entry for cancellation solely on that ground, and affirmed by the Secretary, the commissioner and the Secretary being jointly the defendants in this action.

But assume that we were disposed to test the *bona fides* of the entry on grounds other than the character of the land. We respectfully submit that before the court orders such action, the appellant, by his pleadings, should bring himself within the province of equity. It is not enough that a person wants a retrial on a certain ground; he should present to the

court as an earnest a protestation at least that he is not guilty as found. Yet nowhere in his bill will you find a single averment that Miss Inkster did not make the entry in the Fishers' interest. You will find it charged in the answer that she did. It is at least incumbent upon the appellant to aver that he and May Inkster are not guilty of collusion. If he were, he is not entitled to any relief, because, in that event, he would be guilty of fraud. In our answer (Record, p. 9) we distinctly charge him with fraud. He has introduced no evidence to purge himself of that charge.

V.

On page 19 of the record the court will find the "final certificate" issued by the register of the Evanston land office certifying Inkster's right to the land. The issue of this certificate passes the equitable title from the Government to the entryman, just as later the issue of patent conveys the legal title. When this certificate reaches the General Land Office from the local officers, notation is made upon the tract books, showing the relation that the entryman now sustains to the tract.

On December 12, 1907, the commissioner held the Inkster tract for cancellation, subject to the right of appeal to the secretary—which right was exercised. The appeal operated as a supersedeas. If the appeal had not been perfected, the commissioner would have proceeded to execute his judgment by canceling the final certificate, canceling the entry on the tract

book, and notifying the local officers to *note* the fact of cancellation on their books, for the purpose of opening the land to other disposition.

Noting cancellation on the local land office records has the effect of throwing open the land to proper appropriation by anyone. Prior to that time, third parties may not make entries. (*Germania Iron Co.* v. *James*, 89 Fed., 811.) But the entryman's rights cease and terminate by the execution of the judgment at Washington. Notation on the local land office records does not concern him or his rights.

Now, in the case at bar, the commissioner's judgment was not executed pending Fisher's appeal. After the adverse determination of the appeal by the department, he filed motions for review. When the latter were overruled, the General Land Office had no reason for further delay in executing its judgment. But counsel requested it, hoping to obtain favorable legislation at the hands of Congress (then in special session), which adjourned June 25, 1909. The department awaited until it became apparent that his bill would not pass. On page 20 of the record, the court will find the evidence of the execution of the judgment: The "final certificate" was canceled June 24, 1909, by indorsing thereon:

Cancelled by "H" J. L. M.
Canceled P—June 24, '09.
B. H. G.
"P."

On page 35 of the record you will find the commissioner's letter to the local land officers, dated June 24,

1901. This letter recites that "the entry is hereby canceled. You will allow contestant 30 days preference right of entry."

Appellant's bill was filed June 28, 1909 (Record, p. 1). The Land Department thereupon wired the local land officers on the same date not to note cancellation. Why? Because if they did the land would be thrown open to entry. Other parties would come in, and the case as between Fisher and the Government would become complicated, unnecessarily so when the Government by a telegram could continue the land in a state of reservation from entry by strangers to the suit.

But Inkster's entry ceased to be an entry from and after June 24, 1909, four days before the suit to enjoin cancellation was filed. The most that the court could have done if it took jurisdiction and granted the prayer would have been to enjoin notation of cancellation upon the local land office records, an order which would not benefit Fisher, as it would not restore the land to him and would merely prevent other parties from making entry.

But as we said in our first brief, the Government has since noted cancellation and the contestant and another party has entered the land. Those entries are now intact upon the records. No restraining order was ever issued and the court refused an injunction. What was done in March, 1910, under circumstances explained orally by counsel was ratified and confirmed after the bill had been finally dismissed and before the appeal in this case was per-

fected. We can see no difference between this and the Cardozo case so far as both presented moot questions when they respectively reached your honors.

Respectfully submitted.

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Assistant Attorney for the Appellees.

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